THE IRISH CONSTITUTION

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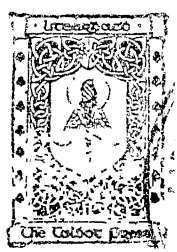

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PREFACE.

THE aim of the following pages has been to give, in a concise form and in non-technical language, an exposition of the general principles of Irish Constitutional Law, as they exist to-day. The effort has been to direct attention to those principles which are fundamental, and especially to possible implications of such principles as are still undetermined, rather than to describe minutely all the details of our Constitutional machinery.

A brief account, in as impartial language as the Author was capable of, is given of those events of History which preceded, and are directly responsible for, the creation of the new Irish Constitution. It is hoped that the reader will, thereby, be enabled to appreciate better the spirit in which its provisions were devised and the circumstances in which its makers performed their task. A knowledge of the theories and opinions, or political philosophy as they are sometimes termed, of the persons responsible for fashioning a Constitution is essential to those who seek, while that Constitution is still in its infancy, to analyse its broad, underlying doctrines and to gauge its working and development.

The Author has, at the same time, endeavoured to indicate those places where the working and development of the Constitution have been along

lines that were not contemplated by its makers. New historical events, politics, fresh theories of government, judicial decisions, economic and social factors, these and many other things tend to make a Constitution in being different from that which its creators visualised, as they regarded it in the making. The six years which have elapsed since the Irish Constitution came into being have demonstrated that it is no exception to the general rule.

It is hoped that the present work may prove of some help to persons who are unable to obtain oral information, and to those who, though they care little for legal subtleties or have little time for minute investigation, are, none the less, desirous of knowing something of the Constitution under which we live.

The thanks of the Author are due to those friends who by their advice and criticism have assisted in the preparation of this work. As however, their criticism was given in confidence and the Author is alone responsible for those errors, of opinion and of fact, which may be found in the following pages, their names, though some would carry weight, shall not be mentioned here. Instead the Author will content himself with this sincere acknowledgment of their generous help and encouragement.

B. O B.

January, 1929.

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CHAPTER VII.

CONSTITUTION OF THE IRISH FREE STATE[1]
(SAORSTÁT EIREANN)

Article 1.

The Irish Free State (otherwise hereinafter called or sometimes called Saorstát Eireann) is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.

Article 2.

All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution.

Article 3.

Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Eireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred;

[1] The text printed here is the official text of the Constitution in the English language, as issued by the Stationery Office, but embodying the first eleven Amendments. The text of the Amendments is printed in italics.

and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Eireann) shall be determined by law.

Article 4.

The National language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament of the Irish Free State (otherwise called and herein generally referred to as the "Oireachtas") for districts or areas in which only one language is in general use.

Article 5.

No title of honour in respect of any services rendered in or in relation to the Irish Free State (Saorstát Eireann) may be conferred on any citizen of the Irish Free State (Saorstát Eireann) except with the approval or upon the advice of the Executive Council of the State.

Article 6.

The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith enquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or judge without delay and to certify in writing as to the cause of the detention and such Court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law:

Provided, however, that nothing in this Article contained shall be invoked to prohibit control or interfere with any act of the military forces of the Irish Free State (Saorstát Eireann) during the existence of a state of war or armed rebellion.

Article 7.

The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law.

Article 8.

Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.

Article 9.

The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious or class distinction.

Article 10.

All citizens of the Irish Free State (Saorstát Eireann) have the right to free elementary education.

Article 11.

All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstát Eireann) hitherto vested in the State, or any depart-

ment thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy), and also all royalties and franchises within that territory shall, from and after the date of the coming into operation of this Constitution, belong to the Irish Free State (Saorstát Eireann), subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein, and shall be controlled and administered by the Oireachtas, in accordance with such regulations and provisions as shall be from time to time approved by legislation, but the same shall not, nor shall any part thereof, be alienated, but may in the public interest be from time to time granted by way of lease or licence to be worked or enjoyed under the authority and subject to the control of the Oireachtas: Provided that no such lease or licence may be made for a term exceeding ninety-nine years, beginning from the date thereof, and no such lease or licence may be renewable by the terms thereof.

Article 12.

A Legislature is hereby created to be known as the Oireachtas. It shall consist of the King and two Houses, the Chamber of Deputies (otherwise called and herein generally referred to as "Dáil Eireann") and the Senate (otherwise called and herein generally referred to as "Seanad Eireann"). The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Eireann) is vested in the Oireachtas.

Article 13.

The Oireachtas shall sit in or near the City of Dublin or in such other place as from time to time it may determine.

Article 14.

All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex, who have reached

the age of twenty-one years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Dáil Eireann, and to take part in the Referendum. No voter may exercise more than one vote at an election to Dáil Eireann and the voting shall be by secret ballot. The mode and place of exercising this right shall be determined by law.[2]

Article 15.

Every citizen who has reached the age of twenty-one years and who is not placed under disability or incapacity by the Constitution or by law shall be eligible to become a member of Dáil Eireann.

Article 16.

No person may be at the same time a member both of Dáil Eireann and of Seanad Eireann, and if any person who is already a member of either House is elected to be a member of the other House, he shall forthwith be deemed to have vacated his first seat.

Article 17.

The oath to be taken by members of the Oireachtas shall be in the following form:—

> I.....do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to H.M. King George V, his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

Such oath shall be taken and subscribed by every

[2] The Seventh Amendment deleted from this Article the following clause :—"All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex who have reached the age of thirty years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Seanad Eireann."

member of the Oireachtas before taking his seat therein before the Representative of the Crown or some person authorised by him.

Article 18.

Every member of the Oireachtas shall, except in case of treason, felony, or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of either House, and shall not, in respect of any utterance in either House, be amenable to any action or proceeding in any Court other than the House itself.

Article 19.

All official reports and publications of the Oireachtas or of either House thereof shall be privileged, and utterances made in either House wherever published shall be privileged.

Article 20.

Each House shall make its own Rules and Standing Orders, with power to attach penalties for their infringement and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

Article 21.

Each House shall elect its own Chairman and Deputy Chairman and shall prescribe their powers, duties, remuneration, and terms of office. *The member of Dáil Éireann who is the Chairman of Dáil Éireann immediately before a dissolution of the Oireachtas shall, unless before such dissolution he announces to Dáil Éireann that he does not desire to continue to be a member thereof, be deemed without any actual election to be elected in accordance with this Constitution at the ensuing general election as a member of Dáil Éireann for the constituency for which he was a member immediately before such dissolution or, in the event of a revision of*

constituencies having taken place, for the revised constituency declared on such revision to correspond to such first-mentioned constituency. Whenever a former Chairman of Dáil Éireann is so deemed to have been elected at a general election as a member for a constituency the number of members actually to be elected for such constituency at such general election shall be one less than would otherwise be required to be elected therefor.[3]

Article 22.

All matters in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present other than the Chairman or presiding member, who shall have and exercise a casting vote in the case of an equality of votes. The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its Standing Orders.

Article 23.

The Oireachtas shall make provision for the payment of its members and may in addition provide them with free travelling facilities in any part of Ireland.

Article 24.

The Oireachtas shall hold at least one session each year. The Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King and subject as aforesaid Dáil Eireann shall fix the date of re-assembly of the Oireachtas, and the date of the conclusion of the session of each House: Provided that the sessions of Seanad Eireann shall not be concluded without its own consent.

Article 25.

Sittings of each House of the Oireachtas shall be public. In cases of special emergency either House

[3] Fourth Amendment.

may hold a private sitting with the assent of two-thirds of the members present.

Article 26.

Dáil Eireann shall be composed of members who represent constituencies determined by law. The number of members shall be fixed from time to time by the Oireachtas, but the total number of members of Dáil Eireann (exclusive of members for the Universities) shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population: Provided that the proportion between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as possible, be identical throughout the country. The members shall be elected upon principles of Proportional Representation. The Oireachtas shall revise the constituencies at least once in every ten years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dáil Eireann sitting when such revision is made.

Article 27.

Each University in the Irish Free State (Saorstát Eireann), which was in existence at the date of the coming into operation of this Constitution, shall be entitled to elect three representatives to Dáil Eireann upon a franchise and in a manner to be prescribed by law.

Article 28.

At a General Election for Dáil Eireann the polls (exclusive of those for members for the Universities) shall be held on the same day throughout the country. and that day shall be a day not later than thirty days after the date for the dissolution.[4] Dáil Eireann

[4] The Second Amendment deleted from this Article the words " and shall be proclaimed a public holiday," which followed the word " dissolution."

shall meet within one month of such day, and shall unless earlier dissolved continue for *six years or such shorter period as may be fixed by legislation*[5] from the date of its first meeting, and not longer. Dáil Eireann may not at any time be dissolved except on the advice of the Executive Council.

Article 29.

In case of death, resignation or disqualification of a member of Dáil Eireann, the vacancy shall be filled by election in manner to be determined by law.

Article 30.

Seanad Eireann shall be composed of citizens who shall be proposed on the grounds that they have done honour to the Nation by reason of useful public service or that, because of special qualifications or attainments, they represent important aspects of the Nation's life.

Article 31.

The number of members of Seanad Eireann shall be sixty. A citizen to be eligible for membership of Seanad Eireann must be a person eligible to become a member of Dáil Eireann, and must have reached the age of *thirty*[6] years. Subject to any provision for the constitution of the first Seanad Eireann the term of office *of members of Seanad Eireann shall, in the case of the members elected (otherwise than under Article 34 of this Constitution) at the election held in pursuance of Article 32 of this Constitution in the year 1925, be twelve years, and shall, in the case of the members elected at the election held pursuant to the said Article 32 to fill the places of members of Seanad Eireann who are due to retire in the year 1928, be as provided in Article 32 B of this Constitution and shall, in every other case but subject to the provisions of the said Article 34, be nine years.*[7]

5 Third Amendment.
6 Ninth Amendment.
7 Eleventh Amendment.

Article 31A.

The duration of the term of office of a member of the first Seanad Éireann shall be reckoned from the beginning of the day on which this Constitution comes into operation, and the duration of the term of office of a member of Seanad Éireann elected under Article 32 of this Constitution shall be reckoned from the beginning of the appropriate triennial anniversary of that day.[7a]

Article 32.

Save as is hereinafter otherwise provided, one third[8] of the members of Seanad Éireann shall be elected every three years from a panel constituted as hereinafter mentioned at an election *at which the electors shall be the members of Dáil Eireann and the members of Seanad Éireann voting together on principles of proportional representation. The voting at such elections shall be by secret ballot and no elector may exercise more than one vote thereat. The place and conduct of such elections shall be regulated by law.*[9]

At the election held in pursuance of this Article to fill the places of members of Seanad Eireann who are due to retire in the year 1928, one-fourth only of the members of Seanad Eireann shall be elected under this Article.[8]

Article 32A.

An election of members of Seanad Éireann under Article 32 of this Constitution may be held at any time not more than three months before nor more than three months after the conclusion of the period of three years mentioned in that Article.

A person who, after the day appointed by law for the completion of the formation of the panel of candidates and before the conclusion of the three years period running on that day, is chosen under Article 34 of this Constitution to fill a vacancy caused by the death, resignation, or disqualification of a member of Seanad Éireann (other than a member about to retire at the

[7a] First Amendment.
[8] Eleventh Amendment.
[9] Seventh Amendment.

conclusion of the said period) shall hold office until the conclusion of the next three years period and shall then retire.[10]

Article 32B.

The respective terms of office of the several members of Seanad Eireann elected at the election held pursuant to Article 32 of this Constitution to fill the places of members of Seanad Eireann who are due to retire in the year 1928 shall be as follows, that is to say :—

(a) *the first five members so elected shall hold office for nine years,*

(b) *so many of the members so elected after such first five members as are necessary to fill under Article 34 of this Constitution additional vacancies (if any) originally created by the death, resignation, or disqualification of members of Seanad Eireann who were due to retire in the year 1937 shall hold office for nine years,*

(c) *the next five members so elected shall hold office for six years,*

(d) *so many of the members so elected after the last mentioned five members as are necessary to fill under Article 34 of this Constitution additional vacancies (if any) originally created by the death, resignation, or disqualification of members of Seanad Eireann who were due to retire in the year 1934 shall hold office for six years,*

(e) *all other members so elected shall hold office for three years.*

The proviso to the said Article 34 shall not apply to the said election.[10a]

Article 33.

Before each election of members of Seanad Eireann a panel of candidates for such election shall be formed in such manner in all respects as shall be prescribed by law.[11]

10 First Amendment.
10a Eleventh Amendment.
11 Tenth Amendment.

Article 34.

In case of the death, resignation or disqualification of a member of Seanad Eireann his place shall be filled by a vote of Seanad Eireann. Any member of Seanad Eireann so chosen shall retire from office at the conclusion of the three years period then running and the vacancy thus created shall be additional to the places to be filled under Article 32 of this Constitution. The term of office of the members chosen at the election after the first *twenty*[12] elected shall conclude at the end of the period or periods at which the member or members of Seanad Eireann, by whose death or withdrawal the vacancy or vacancies was or were originally created, would be due to retire: *Provided that the twenty-first member shall be deemed to have filled the vacancy created by the death or withdrawal of the Senator, or one of the Senators, the unexpired period of whose term of office was greatest at the time of the election and so on.*[13]

Article 35.

Dáil Eireann shall in relation to the subject matter of Money Bills as hereinafter defined have legislative authority exclusive of Seanad Eireann.

A Money Bill means a Bill which contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; subordinate matters incidental to those subjects or any of them. In this definition the expressions "taxation," "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

[12] Eleventh Amendment.
[13] First Amendment.

The Chairman of Dáil Eireann shall certify any Bill which in his opinion is a Money Bill to be a Money Bill, but, if within three days after a Bill has been passed by Dáil Eireann two-fifths of the members of either House by notice in writing addressed to the Chairman of the House of which they are members so require, the question whether the Bill is or is not a Money Bill shall be referred to a Committee of Privileges consisting of three members elected by each House with a Chairman who shall be the senior judge of the Supreme Court able and willing to act, and who, in the case of an equality of votes, but not otherwise, shall be entitled to vote. The decision of the Committee on the question shall be final and conclusive.

Article 36.

Dáil Eireann shall as soon as possible after the commencement of each financial year consider the Estimates of receipts and expenditure of the Irish Free State (Saorstát Eireann) for that year, and, save in so far as may be provided by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year.

Article 37.

Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council.

Article 38.

Every Bill initiated in and passed by Dáil Eireann shall be sent to Seanad Eireann and may, unless it be a Money Bill, be amended in Seanad Eireann and Dáil Eireann shall consider any such amendment; every Money Bill shall be sent to Seanad Eireann for its recommendations and at a period not longer than

twenty-one days after it shall have been sent to Seanad Eireann, it shall be returned to Dáil Eireann which may pass it accepting or rejecting all or any of the recommendations of Seanad Eireann, and as so passed or if not returned within such period of twenty-one days shall be deemed to have been passed by both Houses.

Article 38A.

Whenever a Bill (not being a Money Bill) initiated in and passed by Dáil Éireann and sent to Seanad Éireann is within the stated period hereinafter defined either rejected by Seanad Éireann or passed by Seanad Éireann with amendments to which Dáil Éireann does not agree or is neither passed (with or without amendment) nor rejected by Seanad Eireann within the said stated period, Dáil Eireann may within one year after the said stated period by resolution expressly passed under this Article again send such Bill to Seanad Eireann in the form (save only for such modifications as are hereinafter authorised) in which it was first so sent, and if Seanad Eireann does not within sixty days thereafter or such longer period as may be agreed to by both Houses, pass such Bill either without amendment or with such amendments only as are agreed to by Dáil Eireann, such Bill shall, if Dáil Eireann so resolves after the expiration of such sixty days or longer period aforesaid, be deemed to have been passed by both Houses of the Oireachtas at the expiration of the said sixty days or longer period aforesaid in the form in which it was so last sent to Seanad Eireann with such (if any) amendments as may have been made therein by Seanad Eireann and agreed to by Dáil Eireann.

The said stated period is the period commencing on the day on which the said Bill is first sent by Dáil Eireann to Seanad Eireann and ending at whichever of the following times is the earlier, that is to say, the expiration of eighteen months from the commencement of the said period or the date of the reassembly of the Oireachtas after a dissolution occurring after the commencement of such period.

When a Bill initiated in and passed by Seanad Eireann is amended by Dáil Eireann, such Bill shall be deemed to have been initiated in Dáil Eireann and this Article shall apply to such Bill accordingly and for the purpose of such application the said stated period shall in relation to such Bill commence on the day on which such Bill is first sent to Seanad Eireann after being so amended by Dáil Eireann.

Whenever a Bill has been sent by Dáil Eireann to Seanad Eireann nothing in this Article shall operate to restrict the right of Dáil Eireann to send such Bill on any subsequent occasion to Seanad Eireann otherwise than under this Article, and when such Bill is so sent to Seanad Eireann this Article shall apply as if such subsequent occasion were the first occasion on which such Bill were sent by Dáil Eireann to Seanad Eireann.

A Bill sent a second time by Dáil Eireann to Seanad Eireann and required for the purposes of this Article to be in the form in which it was first so sent may contain such (if any) modifications as shall be certified by the Chairman of Dáil Eireann to represent amendments made therein by Seanad Eireann and agreed to by Dáil Eireann or to be necessary owing to the lapse of time since such Bill was first sent by Dáil Eireann to Seanad Eireann.[15]

Article 39.

A Bill may be initiated in Seanad Eireann and if passed by Seanad Eireann shall be introduced into Dáil Eireann. If amended by Dáil Eireann the Bill shall be considered as a Bill initiated in Dáil Eireann. If rejected by Dáil Eireann it shall not be introduced again in the same session, but Dáil Eireann may reconsider it on its own motion.

Article 40.

A Bill passed by either House and accepted by the other House shall be deemed to be passed by both Houses.

[15] Eighth Amendment.

Article 41.

So soon as any Bill shall have been passed or deemed to have been passed by both Houses, the Executive Council shall present the same to the Representative of the Crown for the signification by him, in the King's name, of the King's assent, and such Representative may withhold the King's assent or reserve the Bill for the signification of the King's pleasure: Provided that the Representative of the Crown shall in the withholding of such assent to or the reservation of any Bill, act in accordance with the law, practice, and constitutional usage governing the like withholding of assent or reservation in the Dominion of Canada.

A Bill reserved for the signification of the King's Pleasure shall not have any force unless and until within one year from the day on which it was presented to the Representative of the Crown for the King's Assent, the Representative of the Crown signifies by speech or message to each of the Houses of the Oireachtas, or by proclamation, that it has received the Assent of the King in Council.

An entry of every such speech, message or proclamation shall be made in the Journal of each House and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of the Irish Free State (Saorstát Eireann).

Article 42.

As soon as may be after any law has received the King's assent, the clerk, or such officer as Dáil Eireann may appoint for the purpose, shall cause two fair copies of such law to be made, one being in the Irish language and the other in the English language (one of which copies shall be signed by the Representative of the Crown to be enrolled for record in the office of such officer of the Supreme Court as Dáil Eireann may determine), and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two

copies so deposited, that signed by the Representative of the Crown shall prevail.

Article 43.

The Oireachtas shall have no power to declare acts to be infringements of the law which were not so at the date of their commission.

Article 44.

The Oireachtas may create subordinate legislatures with such powers as may be decided by law.

Article 45.

The Oireachtas may provide for the establishment of Functional or Vocational Councils representing branches of the social and economic life of the Nation. A law establishing any such Council shall determine its powers, rights and duties, and its relation to the government of the Irish Free State (Saorstát Eireann).

Article 46.

The Oireachtas has the exclusive right to regulate the raising and maintaining of such armed forces as are mentioned in the Scheduled Treaty in the territory of the Irish Free State (Saorstát Eireann) and every such force shall be subject to the control of the Oireachtas.

Article 49.[16]

Save in the case of actual invasion, the Irish Free State (Saorstát Eireann) shall not be committed to active participation in any war without the assent of the Oireachtas.

[16] The Sixth Amendment deleted from the Constitution the Forty-Seventh and Forty-Eighth Articles which were as follows :—" Article 47.—Any Bill passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the written demand of two-fifths of the members of Dáil Eireann, or of a majority of the members of Seanad Eireann presented to the President of the Executive Council not later than seven days from the day on which such Bill shall have been so passed or deemed to have been so passed. Such a Bill shall in accordance with regulations

Article 50.

Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be

to be made by the Oireachtas be submitted by Referendum to the decision of the people if demanded before the expiration of the ninety days either by a resolution of Seanad Eireann assented to by three-fifths of the members of Seanad Eireann, or by a petition signed by not less than one-twentieth of the voters then on the register of voters, and the decision of the people by a majority of the votes recorded on such Referendum shall be conclusive. These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety.

"Article 48.—The Oireachtas may provide for the Initiation by the people of proposals for laws or constitutional amendments. Should the Oireachtas fail to make such provision within two years, it shall on the petition of not less than seventy-five thousand voters on the register, of whom not more than fifteen thousand shall be voters in any one constituency, either make such provisions or submit the question to the people for decision in accordance with the ordinary regulations governing the Referendum. Any legislation passed by the Oireachtas providing for such Initiation by the people shall provide (1) that such proposals may be initiated on a petition of fifty thousand voters on the register, (2) that if the Oireachtas rejects a proposal so initiated it shall be submitted to the people for decision in accordance with the ordinary regulations governing the Referendum; and (3) that if the Oireachtas enacts a proposal so initiated, such enactment shall be subject to the provisions respecting ordinary legislation or amendments of the Constitution as the case may be."

made within the said period of eight years by way of ordinary legislation.[17]

Article 51.

The Executive Authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisible, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown. There shall be a Council to aid and advise in the government of the Irish Free State (Saorstát Eireann) to be styled the Executive Council. The Executive Council shall be responsible to Dáil Eireann, and shall consist of not more than *twelve*[18] nor less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council.

Article 52.

Those Ministers who form the Executive Council shall all be members of Dáil Eireann and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance.

Article 53.

The President of the Council shall be appointed on the nomination of Dáil Eireann. He shall nominate a Vice-President of the Council, who shall act for all purposes in the place of the President, if the President shall die, resign or be permanently incapacitated, until a new President of the Council shall have been elected. The Vice-President shall also act in the place of the President during his temporary absence. The other Ministers who are to hold office as members

[17] The Sixth Amendment deleted from the end of this Article the words " and as such shall be subject to the provisions of Article 47 hereof."

[18] Fifth Amendment.

of the Executive Council shall be appointed on the nomination of the President, with the assent of Dáil Eireann, and he and the Ministers nominated by him shall retire from office should he cease to retain the support of the majority in Dáil Eireann, but the President and such Ministers shall continue to carry on their duties until their successors shall have been appointed: Provided, however, that the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann.

Article 54.

The Executive Council shall be collectively responsible for all matters concerning the Departments of State administered by Members of the Executive Council. The Executive Council shall prepare Estimates of the receipts and expenditure of the Irish Free State (Saorstát Eireann) for each financial year, and shall present them to Dáil Eireann before the close of the previous financial year. The Executive Council shall meet and act as a collective authority.

Article 55.

Ministers who shall not be members of the Executive Council may be appointed by the Representative of the Crown and shall comply with the provisions of Article 17 of this Constitution. Every such Minister shall be nominated by Dáil Eireann on the recommendation of a Committee of Dáil Eireann chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann. Should a recommendation not be acceptable to Dáil Eireann, the Committee may continue to recommend names until one is found acceptable. The total number of Ministers, including the Ministers of the Executive Council, shall not exceed twelve.

Article 56.

Every Minister who is not a member of the Executive Council shall be the responsible head of

the Department or Departments under his charge, and shall be individually responsible to Dáil Eireann alone for the administration of the Department or Departments of which he is the head: Provided that should arrangements for Functional or Vocational Councils be made by the Oireachtas these Ministers or any of them may, should the Oireachtas so decide, be members of, and be recommended to Dáil Eireann by, such Councils. The term of office of any Minister, not a Member of the Executive Council, shall be the term of Dáil Eireann existing at the time of his appointment, but he shall continue in office until his successor shall have been appointed, and no such Minister shall be removed from office during his term otherwise than by Dáil Eireann itself, and then for stated reasons, and after the proposal to remove him has been submitted to a Committee, chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann, and the Committee has reported thereon.

Article 57.

Every Minister shall have the right to attend and be heard in Seanad Eireann.

Article 58.

The appointment of a member of Dáil Eireann to be a Minister shall not entail upon him any obligation to resign his seat or to submit himself for re-election.

Article 59.

Ministers shall receive such remuneration as may from time to time be prescribed by law, but the remuneration of any Minister shall not be diminished during his term of office.

Article 60.

The Representative of the Crown, who shall be styled the Governor-General of the Irish Free State (Saorstát Eireann) shall be appointed in like manner

as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments. His salary shall be of the like amount as that now payable to the Governor-General of the Commonwealth of Australia and shall be charged on the public funds of the Irish Free State (Saorstát Eireann) and suitable provision shall be made out of those funds for the maintenance of his official residence and establishment.

Article 61.

All revenues of the Irish Free State (Saorstát Eireann) from whatever source arising, shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes of the Irish Free State (Saorstát Eireann) in the manner and subject to the charges and liabilities imposed by law.

Article 62.

Dáil Eireann shall appoint a Comptroller and Auditor-General to act on behalf of the Irish Free State (Saorstát Eireann). He shall control all disbursements and shall audit all accounts of moneys administered by or under the authority of the Oireachtas and shall report to Dáil Eireann at stated periods to be determined by law.

Article 63.

The Comptroller and Auditor-General shall not be removed except for stated misbehaviour or incapacity on resolutions passed by Dáil Eireann and Seanad Eireann. Subject to this provision the terms and conditions of his tenure of office shall be fixed by law. He shall not be a member of the Oireachtas nor shall he hold any other office or position of emolument.

Article 64.

The judicial power of the Irish Free State (Saorstát Eireann) shall be exercised and justice administered

in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided. These Courts shall comprise Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court, invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also Courts of local and limited jurisdiction with a right of appeal as determined by law.

Article 65.

The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction.

Article 66.

The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever: Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.

Article 67.

The number of judges, the constitution and organisation of, and distribution of business and jurisdiction among, the said Courts and judges, and all matters of procedure shall be as prescribed by the laws for the time being in force and the regulations made thereunder.

Article 68.

The judges of the Supreme Court and of the High Court, and of all other Courts established in pursuance of this Constitution shall be appointed by the Representative of the Crown on the advice of the Executive Council. The judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both Dáil Eireann and Seanad Eireann. The age of retirement, the remuneration and the pension of such judges on retirement and the declarations to be taken by them on appointment shall be prescribed by law. Such remuneration may not be diminished during their continuance in office. The terms of appointment of the judges of such other courts as may be created shall be prescribed by law.

Article 69.

All judges shall be independent in the exercise of their functions, and subject only to the Constitution and the law. A judge shall not be eligible to sit in the Oireachtas, and shall not hold any other office or position of emolument.

Article 70.

No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such Military Tribunals as may be authorised by law for dealing with military offenders against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction.

Article 71.

A member of the armed forces of the Irish Free State (Saorstát Eireann) not on active service shall not be tried by any Court Martial or other Military Tribunal for an offence cognisable by the Civil Courts, unless such offence shall have been brought expressly within the jurisdiction of Courts Martial or other Military Tribunal by any code of laws or regulations for the enforcement of military discipline which may be hereafter approved by the Oireachtas.

Article 72.

No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable by law before a Court of Summary Jurisdiction, and in the case of charges for offences against military law triable by Court Martial or other Military Tribunal.

TRANSITORY PROVISIONS.

Article 73.

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Article 74.

Nothing in this Constitution shall effect any liability to pay any tax or duty payable in respect of the financial year current at the date of the coming into operation of this Constitution or any preceding financial year, or in respect of any period ending on or before the last day of the said current financial year, or payable on any occasion happening within that or any preceding year, or the amount of such liability; and during the said current financial year all taxes and duties and arrears thereof shall continue

to be assessed, levied and collected in like manner in all respects as immediately before this Constitution came into operation, subject to the like adjustments of the proceeds collected as were theretofore applicable; and for that purpose the Executive Council shall have the like powers and be subject to the like liabilities as the Provisional Government.

Goods transported during the said current financial year from or to the Irish Free State (Saorstát Eireann) to or from any part of Great Britain or the Isle of Man shall not, except so far as the Executive Council may otherwise direct, in respect of the forms to be used and the information to be furnished, be treated as goods exported or imported as the case may be.

For the purpose of this Article, the expression "financial year" means, as respects income tax (including super-tax) the year of assessment, and as respects other taxes and duties, the year ending on the thirty-first day of March.

Article 75.

Until Courts have been established for the Irish Free State (Saorstát Eireann) in accordance with this Constitution, the Supreme Court of Judicature, County Courts, Courts of Quarter Sessions and Courts of Summary Jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore, and any judge or justice, being a member of any such Court, holding office at the time when this Constitution comes into operation, shall for the time being continue to be a member thereof and hold office by the like tenure and upon the like terms as heretofore, unless, in the case of a judge of the said Supreme Court or of a County Court, he signifies to the Representative of the Crown his desire to resign. Any vacancies in any of the said Courts so continued may be filled by appointment made in like manner as appointments to judgeships in the Courts established under this Constitution: Provided that the provisions of Article 66 of this Constitution as to the decisions of the Supreme Court

established under this Constitution shall apply to decisions of the Court of Appeal continued by this Article.

Article 76.

If any judge of the said Supreme Court of Judicature or of any of the said County Courts on the establishment of Courts under this Constitution, is not with his consent appointed to be a judge of any such Court, he shall, for the purpose of Article 10 of the Scheduled Treaty, be treated as if he had retired in consequence of the change of Government effected in pursuance of the said Treaty, but the rights so conferred shall be without prejudice to any rights or claims that he may have against the British Government.

Article 77.

Every existing officer of the Provisional Government at the date of the coming into operation of this Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State (Saorstát Eireann), and shall hold office by a tenure corresponding to his previous tenure.

Article 78.

Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty.

Article 79.

The transfer of the administration of any public service, the administration of which was not before the date of the coming into operation of this Constitution transferred to the Provisional Government, shall be deferred until the 31st day of March, 1923,

or such earlier date as may, after one month's previous notice in the Official Gazette, be fixed by the Executive Council; and such of the officers engaged in the administration of those services at the date of transfer as may be determined in the manner hereinafter appearing shall be transferred to and become officers of the Irish Free State (Saorstát Eireann); and Article 77 of this Constitution shall apply as if such officers were existing officers of the Provisional Government who had been transferred to that Government from the British Government. The officers to be so transferred in respect of any services shall be determined in like manner as if the administration of the services had before the coming into operation of the Constitution been transferred to the Provisional Government.

Article 80.

As respects departmental property, assets, rights and liabilities, the Government of the Irish Free State (Saorstát Eireann) shall be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department of the British Government become functions of the Government of the Irish Free State (Saorstát Eireann), as the successors of such department of the British Government.

Article 81.

After the date on which this Constitution comes into operation the House of the Parliament elected in pursuance of the Irish Free State (Agreement) Act, 1922 (being the constituent assembly for the settlement of this Constitution), may, for a period not exceeding one year from that date, but subject to compliance by the members thereof with the provisions of Article 17 of this Constitution, exercise all the powers and authorities conferred on Dáil Eireann by this Constitution, and the first election for Dáil

Eireann under Articles 26, 27 and 28 hereof shall take place as soon as possible after the expiration of such period.

Article 82.

Notwithstanding anything contained in Articles 14 and 33 hereof, the first Seanad Eireann shall be constituted immediately after the coming into operation of this Constitution in the manner following, that is to say:—

(*a*) The first Seanad Eireann shall consist of sixty members, of whom thirty shall be elected and thirty shall be nominated.

(*b*) The thirty nominated members of Seanad Eireann shall be nominated by the President of the Executive Council who shall, in making such nominations have special regard to the providing of representation for groups or parties not then adequately represented in Dáil Eireann.

(*c*) The thirty elected members of Seanad Eireann shall be elected by Dáil Eireann voting on principles of Proportional Representation.

(*d*) Of the thirty nominated members, fifteen to be selected by lot, shall hold office for the full period of twelve years, the remaining fifteen shall hold office for the period of six years.

(*e*) Of the thirty elected members the first fifteen elected shall hold office for the period of nine years, the remaining fifteen shall hold office for the period of three years.

(*f*) At the termination of the period of office of any such members, members shall be elected in their place in manner provided by Article 32 of this Constitution.

(*g*) Casual vacancies shall be filled in manner provided by Article 34 of this Constitution.

Article 83.

The passing and adoption of this Constitution by the Constituent Assembly and the British Parliament shall be announced as soon as may be, and not later than the sixth day of December, Nineteen hundred and twenty-two, by Proclamation of His Majesty, and this Constitutoin shall come into operation on the issue of such Proclamation.

CHAPTER I.

HISTORICAL.

IN order to understand the Irish Constitution of 1922 it is necessary to consider briefly, in addition to the Anglo-Irish Treaty upon which that Constitution is based, the historical circumstances which gave rise to that Treaty. These circumstances are so intimately bound up with the Treaty and their influence upon the form and spirit of the Constitution is so marked, that it may be said, without exaggeration, that to them the Constitution owes its very existence.

On 21st January, 1919, there was convened in the Mansion House, Dublin, a meeting of all the members elected to represent constituencies in Ireland at the General Election held the previous month. Sinn Féin had fought the election upon the issue of Independence, and its candidates pledged themselves if elected not to take their seats in the British Parliament, or in any way to acknowledge the right of that Parliament to legislate for Ireland. Outside the North-eastern counties of Ulster Sinn Féin succeeded in capturing almost every seat. There actually attended at the Mansion House meeting only those members of the Sinn Féin party who were not in prison, but their mandate to speak and act in the name of the Irish People as the representatives of the majority of the Nation could not be doubted. The assembly drew up and promulgated a provisional constitution[1] for itself as Dáil Eireann, the Parliament

[1] *Vide Minutes of the Proceedings of the First Parliament of the Republic of Ireland.*

of Ireland, with a Ministry responsible to it, and adopted a Declaration of Independence[2] ratifying, in the name of the Irish Nation, the establishment of the Irish Republic proclaimed on Easter Monday, 1916.

I.—WAR.

The British Government treated Dáil Eireann as an illegal assembly. As the Government of the United Kingdom they regarded themselves as the lawful sovereign government of Ireland. The Dáil, on its part, backed by the majority of the Irish people, proceeded to give effect so far as it could to the Declaration of Independence and its Ministry to function as the Government of the country. Local Bodies throughout the country pledged their allegiance to the Dáil, and declined to obey the orders given by Departments of the British Government. Courts set up by Dáil Eireann became serious rivals of the British Courts, which in some cases were entirely deserted by litigants. The British Government at first tolerated the meeting of the Dáil and did not molest its members, probably thinking that if left to itself the Dáil would be unable to make good its claim, and would end in futility. This policy was not suffered to remain long in force however. Alarmed at the increasing prestige of the Dáil, and by the success of its first efforts, the British Government after a short time attempted to frustrate its increasing activities by wholesale arrests of its members and officers. The Dáil replied by also calling on physical force. The Irish Volunteers[3] acting now as the Army of the Irish Republic—the "I. R. A."—came into action. A state of guerilla warfare developed and continued with increasing violence throughout 1920 and 1921 until the Truce. General Smuts, who visited Ireland in 1921, when the struggle was at its height,

[2] Ibid.
[3] Officially designated "Ogláig na h-Eireann."

described the struggle as a more bloody business than anything he had seen in South Africa during the Boer war.

In the midst of this struggle the British Parliament passed an Act entitled the Government of Ireland Act, 1920.[4] This Act, for which not a single Irish representative voted, purported to divide Ireland into two parts—Northern Ireland, consisting of six out of the nine counties of Ulster, Antrim, Armagh, Derry, Down, Tyrone, and Fermanagh; and Southern Ireland, consisting of the remaining twenty-six counties. A General Election for the purpose of electing members of the two Houses of Commons of Northern and Southern Ireland, as provided in the Act, was ordered, by Proclamation of the Lord Lieutenant, to be held in May, 1921, Dáil Eireann, choosing the line of least resistance, by resolution, declared that the elections in both Northern and Southern Ireland should constitute elections to the second Dáil Eireann, and provided for the dissolution of the first Dáil upon the summoning of the new Dáil Eireann. It fell to the lot of this new Dáil to decide the momentous issue of accepting or rejecting the Treaty.

Early in 1921 the situation had become so serious that the British Government were faced with the prospect of having, at least, to double the number of their troops in order to achieve a military defeat of their opponents within a reasonable period. The Irish People, in whose country the struggle was being fought out, found the strain becoming daily greater. After several preliminary "feelers" by Mr. Lloyd George, a Truce was arranged between the British and Irish forces as a preliminary to Peace Negotiations, and came into force at noon on the 11th July, 1921.

II.—PEACE NEGOTIATIONS.

The urgent need for a settlement felt by both the Dáil Ministry and the British Government forbade

[4] 10 & 11 Geo. V, ch. 67.

either of them to take up a purely doctrinaire attitude in its dealings with the other party. Each, while maintaining its claim, abstained from insisting upon formal recognition of that position by the other. In a document, dated the 20th July, 1921, Mr. Lloyd George, the British Prime Minister, presented the proposals of the British Government for a settlement. The proposals enumerated certain principles and conditions as a broad outline of a settlement. One sentence in particular is worthy of note, because of its bearing upon the form which the final agreement took nearly six months later. "In accordance with these principles the British Government propose that the conditions of settlement between Great Britain and Ireland shall be embodied in the form of a treaty, to which effect shall in due course be given by the British and Irish Parliaments."[5]

Mr. de Valera, as President of Dáil Eireann, replied to these proposals in a despatch dated the 10th August, 1921, addressed to Mr. Lloyd George. One or two sentences may be quoted to show the Irish standpoint. "We cannot propose to abrogate or impair it" (i.e., Ireland's right to self-determination) "nor can Britain or any other foreign state or group of states legitimately claim to interfere with its exercise in order to serve their own special interests." . . . . ". . . . It must of course be understood that all treaties and agreements would have to be submitted for ratification to the National Legislature in the first instance and subsequently to the Irish people as a whole. . . . ."[6]

On the 13th August, 1921, the British Premier replied to Mr. de Valera. This despatch, which was addressed to "Eamon de Valera, Esq., The Mansion House, Dublin," set forth explicitly the standpoint of the British Government as regards Ireland's status. "In our opinion nothing is to be gained by prolonging

[5] *Official Correspondence relating to the Peace Negotiations*, p. 7. Dublin (1921).
[6] Ibid. p. 10.

a theoretical discussion of the national status which you may be willing to accept as compared with that of the great self-governing Dominions of the British Commonwealth, but we must direct your attention to one point upon which you lay some emphasis, and upon which no British Government can compromise—namely, the claim that we should acknowledge the claim of Ireland to secede from her allegiance to the King. No such right can ever be acknowledged by us."[7]

On August 24th, 1921, the British Government were informed that Dáil Eireann had rejected the British terms of peace. In the concluding paragraph of this Note Mr. de Valera stated: "On the basis of the broad guiding principle of government by the consent of the governed, peace can be secured—a peace that will be just and honourable to all, and fruitful of concord and enduring amity. To negotiate such a peace Dáil Eireann is ready to appoint its representatives, and if your Government accepts the principle proposed, to invest them with plenary powers to meet and arrange with you for its application in detail."[8]

That both parties adhered to their respective standpoints to the end is made clear by the two final communications which passed between Mr. Lloyd George and Mr. de Valera. On the 29th September, 1921, the former telegraphed to Mr. de Valera: "His Majesty's Government have given close and earnest consideration to the correspondence which has passed between us since their invitation to you to send delegates to a conference at Inverness. In spite of their sincere desire for peace, and in spite of the more conciliatory tone of your last communication, they cannot enter a conference upon the basis of this correspondence. Notwithstanding your personal assurance to the contrary, which they much appreciate, it might be argued in future that the acceptance of a conference on this basis had involved them in a

[7] Ibid, p. 11.
[8] Ibid, p. 13.

recognition which no British Government can accord. On this point they must guard themselves against any possible doubt. There is no purpose to be served by any argumentative communications upon this subject. The position taken up by His Majesty's Government is fundamental to the existence of the British Empire and they cannot alter it. My colleagues and I remain, however, keenly anxious to make in co-operation with your delegates another determined effort by personal discussion. The proposals which we have already made have been taken by the whole world as proof that our endeavours are no empty form, and we feel that conference, not correspondence, is the most practicable and hopeful way to an understanding such as we ardently desire to achieve. We, therefore, send you herewith a fresh invitation to a conference in London on October 11th, where we can meet your delegates as spokesmen of the people whom you represent with a view to ascertaining how the association of Ireland with the community of nations known as the British Empire may best be reconciled with Irish National aspirations."[9]

Mr. de Valera's reply despatched the following day was as follows:

"We have received your letter of invitation to a conference in London on October 11th, with a view to ascertaining how the association of Ireland with the community of Nations known as the British Empire may best be reconciled with Irish National aspirations.

"Our respective positions have been stated and are understood, and we agree that conference, not correspondence, is the most practicable and hopeful way to an understanding. We accept the invitation, and our delegates will meet you in London on the date mentioned to explore every possibility of settlement by personal discussion."[10]

This long correspondence, ending in the assembling of a Peace Conference with a view to examining how

[9] Ibid, p. 22.
[10] Ibid, p. 23.

"the association of Ireland with the community of Nations known as the British Empire might best be reconciled with Irish National aspirations" left each side in a position to state with truth that it had not abandoned its basic standpoint. The British Government had not involved themselves in a formal recognition of the Irish Republic, although many of their actions, starting with the conclusion of the Truce between the British and Irish armies were hardly consistent with their claim to be a Government dealing with citizens of their own state. The Dáil Ministry, on their side, at no stage of these discussions abandoned their claim to be the lawful Government of an Irish State[11] dealing with a Government whose invading troops were in *de facto* occupation of much of their territory. These circumstances had important effects, at a later period, upon the form of the agreement, the manner of its ratification, and the manner of drafting and the enactment of the new Irish Constitution.

The Dáil Ministry nominated as plenipotentiaries:— Arthur Griffith, Michael Collins, Robert C. Barton, Edmond J. Duggan and George Gavan Duffy, and these names were approved by Dáil Eireann at the session of the 14th September, 1921. The credentials of the plenipotentiaries were issued by Mr. de Valera, dated 7th October, 1921, sealed with the seal of Dáil Eireann, and read as follows: "To all to whom these presents come, greeting. In virtue of the authority vested in me by Dáil Eireann, I hereby appoint Arthur Griffith, T.D., Minister for Foreign Affairs, Chairman; Michael Collins, T.D., Minister for Finance; Robert C. Barton, T.D., Minister for Economic Affairs; Edmund J. Duggan, T.D.; and George Gavan Duffy, T.D., as envoys plenipotentiaries from the elected Government of the Republic of Ireland to negotiate and conclude on behalf of Ireland, with the representatives of His Britannic Majesty George V a treaty or treaties of settlement, association and

11 *Vide* Zimmern, *The Third British Empire*, p. 36, London (1926) for an impartial view.

accommodation between Ireland and the community of Nations known as the British Commonwealth. In witness hereof I hereunder subscribe my name as President.—(Signed) Eamon de Valera."[12]

The Irish plenipotentiaries had full powers as defined in these credentials as regards the concluding of a treaty or treaties, subject to such treaty or treaties being submitted subsequently to Dáil Eireann for acceptance or rejection.

It was announced officially on the 7th October that the British representatives would be Mr. Lloyd George, Prime Minister; Mr. Austen Chamberlain, Leader of the House of Commons; Lord Birkenhead, Lord Chancellor; Mr. Winston Churchill, Secretary of State for the Colonies; Sir L. Worthington-Evans, Secretary of State for War; and Sir Hamar Greenwood, Chief Secretary for Ireland.

The first session of the Conference was held at 10 Downing Street, London, at 11 a.m. on the 11th October, 1921, and in order to avoid any difficulty with regard to precedence, it was decided that there should be no Chairman of the Conference. The negotiations lasted throughout October and November. The Irish Plenipotentiaries had to return frequently to Ireland in order to keep the Dáil Ministry informed of the progress of events. At a meeting of that Ministry, held on the 3rd December, 1921, the Delegation laid before the meeting a Draft Treaty from the British Delegation. It was unanimously regarded as unacceptable as it stood, and rejected. The Irish Delegation returned to England that evening and negotiations were resumed with the British Representatives on Sunday, 4th December, but ended in a definite breakdown.

Early the following day the Chairman of the British Delegation, Mr. Lloyd George, asked for a further discussion before the breakdown should be publicly announced. On the evening of the 5th

[12] *Dáil Eireann. Debate on the Treaty*, p. 11.

December negotiations were again resumed, and during the night a draft, differing considerably from the previous one, and acceptable to the Irish Delegation was agreed upon. The final negotiations lasted from 11 p.m. on the 5th December until 2.20 a.m. the following morning, when the Articles of Agreement for a Treaty between Great Britain and Ireland were signed by the representatives of both countries.

III.—PEACE.

Article 18 of the Treaty[13] provided that the Irish signatories should submit that instrument to a meeting, summoned for the purpose, of the members elected to sit in the House of Commons of Southern Ireland, while the British Government were to submit it to the British Parliament. This Article clearly secured that the approval of the British Parliament alone should not be sufficient to make the Articles of Agreement effective as a treaty and so safeguarded the position of Irish Delegates who could not admit the claim of that Parliament to act in the name of Ireland. At the same time, Article 18 evaded that formal recognition of Dáil Eireann by the British Government such as a proviso that the Treaty was to be submitted by the Irish signatories to Dáil Eireann for approval would have involved. That the approval of the Dáil was in fact an essential the British Delegation cannot have doubted. The Irish Delegation made it clear that their signatures merely bound themselves personally to recommend the Articles of Agreement to Dáil Eireann for approval, but that the rejection or approval of them lay with the Dáil.

On the 14th December, 1921, the Dáil assembled to consider the Treaty, and Mr. Arthur Griffith, the Chairman of the Delegation, moved on the 19th December:—"That Dáil Eireann approves of the Treaty between Great Britain and Ireland signed in London on 6th December, 1921." On the 7th January,

[13] *Vide* Appendix I.

1922, after a protracted debate in which almost every deputy took part, Dáil Eireann approved of the Treaty by a majority of seven votes, sixty-four deputies voting in favour of approval, and fifty-seven against it. Mr. de Valera thereupon tendered the resignations of himself and of the members of his Ministry.

The Treaty was an instrument born of war, a war that did not end either with the skirl of the Píob Mór being heard in Whitehall or with an Irish Waterloo. It was a compromise between two nations each of which considered that it could subscribe to its terms without dishonour. The Dáil accepted it on behalf of the Irish People, not indeed as a complete recognition of what it held to be their right, but in the conviction that it was the safest course for their liberty, their dignity, and their happiness.

On the 10th January Mr. Griffith was elected President of Dáil Eireann, and nominated as members of his Ministry Michael Collins, Minister of Finance; George Gavan Duffy, Minister of Foreign Affairs; Edmund Duggan, Minister for Home Affairs; William T. Cosgrave, Minister for Local Government; Kevin O'Higgins, Minister for Economic Affairs; and Richard Mulcahy, Minister of Defence.

Speaking as President, Mr. Griffith stated in Dáil Eireann that it was his intention to keep the Republic in being until the Irish Free State should come into existence. At the same time he announced that he intended to carry out the will of the Dáil as expressed in the motion approving of the Treaty. Accordingly Mr. Griffith, in his capacity as Chairman of the Irish Delegation, addressed an invitation to all the persons elected for constituencies in " Southern Ireland," as defined by the Government of Ireland Act, 1920,[14] to attend a meeting, for the purpose of formally approving of the Articles of Agreement and for constituting a Provisional Government in accordance with Articles 17 and 18 of the Treaty.[15]

This meeting took place in the Mansion House,

[14] 10 & 11 Geo. V, ch. 67.
[15] *Vide* Appendix I.

Dublin, on the 14th January, 1922. The proceedings opened with the calling of the roll, and the reading of the letter of the Chairman of the Irish Delegation convening the meeting. A resolution formally approving of the Articles of Agreement was passed unanimously, and a Provisional Government as prescribed by Article 17 was appointed, consisting of:—Michael Collins, Chairman; W. T. Cosgrave, Edmund Duggan, Patrick Hogan, Finian Lynch, Joseph McGrath, Eoin MacNeill, and Kevin O'Higgins.

This Assembly, which appointed the Provisional Government, was not identical with Dáil Eireann, which consisted, in theory at least, of the elected representatives of all the constituencies in Ireland. The representatives of Dublin University who in fact never took their seats in the first or second Dála attended the meeting summoned by the Chairman of the Delegation, and none of the representatives of constituencies in Northern Ireland attended, in that capacity, nor were they invited.

At the same time the meeting which assembled in the Mansion House, Dublin, did not constitute a meeting of the House of Commons of Southern Ireland much less of the Parliament of Southern Ireland, neither of which ever functioned. This becomes clear when the Government of Ireland Act, 1920,[16] is considered. Section 11 (ii.) enacted that "The Lord Lieutenant shall in His Majesty's name, summon, prorogue and dissolve the Parliament of Southern Ireland." Section 18 (ii.) prescribed that members of the Senate and House of Commons of Southern Ireland should take the oath required to be taken by members of the British House of Commons. No oath was taken by the members present at the Mansion House meeting. Section 4 of the Act which dealt with the Legislative Powers of the Parliament of Southern Ireland enacted that it should not have power to make laws in respect of, amongst other matters "Treaties, or any relations with foreign

[16] 10 & 11 Geo. V, ch. 67.

states, or relations with other parts of His Majesty's Dominions, or matters involving the contravention of treaties or agreements with foreign states or any part of His Majesty's Dominions, or offences connected with any such treaties or relations . . . .'' but the *raison d'être* of this Mansion House meeting was to give formal approval to a Treaty.

The Treaty prescribed that ratification of the Treaty should be done in a certain manner. The method prescribed was not the manner in which International Treaties are usually ratified. It is nevertheless quite in accord with International Law for the contracting parties to a Treaty to provide that the instrument shall be ratified in a particular manner, or even that ratification shall be dispensed with. The approval of the meeting held in the Mansion House was a particular formality which it was agreed, for reasons already explained, should constitute a part of the ratification by the Irish contracting party.

The Provisional Government formed the channel for effecting the transfer of the powers and machinery hitherto held by the British Government in Ireland.

A proclamation signed by the members of the Provisional Government and dated the 20th January, 1922,[17] announced that the Provisional Government, having been duly constituted pursuant to the Provisions of the Treaty, intended to undertake and discharge the duties and functions of the Provisional Government as from that date.

The British Government, on its side, commenced the transfer of its machinery immediately after the setting up of the Provisional Government, and the evacuation of the British Navy, Army and Air Force began, their stations and camps being taken over by the Irish Army. On the 31st March, 1922, the British Parliament passed an Act entitled The Irish Free State (Agreement) Act, 1922[18] giving the force of law, from the British point of view, to the Articles of Agreement

[17] *Iris Oifigiúil,* 14th Feb., 1922.
[18] 12 Geo. V, ch. 4.

and authorising the transfer referred to in Article 17 of the Treaty. A difference of opinion arose between the British and the Irish representatives as to whether this Act constituted the "necessary legislation" which was to ratify the Treaty on the British side in accordance with Article 18. The British Representatives held that it did not, and that further legislation was necessary. The Irish Representatives contended that this Act did amount to ratification, but while maintaining this standpoint they agreed to allow that the month mentioned in Articles 11 and 12 of the Treaty during which Northern Ireland was to have the right to opt out of the Free State, should be deemed to run from the date of the passing of an Act which was to be passed later by the British Parliament. In agreement with the Irish Representatives this Act also provided for an election to be held to constitute a Parliament to which the Provisional Government should be responsible. Dáil Eireann, up to that time, had never passed an electoral law but had always adapted by Decree the existing British Laws and the Parliamentary Elections in Ireland so as to constitute elections of members to Dáil Eireann. In accordance with a resolution passed by the first Dáil on the 10th May, 1921, the second Dáil Eireann had been elected at the General Election held in that month pursuant to an Act of the British Parliament. Following this practice the second Dáil on 20th May, 1922, passed a resolution prescribing that elections for a Third Dáil should be held on 16th June, 1922, in the manner mentioned in the British "Irish Free State (Agreement) Act, 1922."[19] To this Dáil fell the task of enacting the new Constitution.

[19] 12 Geo. V, ch. 4.

CHAPTER II.

THE FRAMING OF THE CONSTITUTION.

I.—THE CONSTITUTION COMMITTEE.

SHORTLY after the Provisional Government had been constituted, it appointed a Committee to prepare a draft constitution for the Irish Free State. The Committee consisted of Michael Collins, Chairman; Darrell Figgis, Vice Chairman and Secretary; James Douglas, Hugh Kennedy, K.C., Law Adviser to the Provisional Government; James Murnaghan, Professor of Jurisprudence and Roman Law, University College, Dublin; James MacNeill, Alfred O'Rahilly, C.J., France; Kevin O'Shiel, Barrister-at-Law; and John O'Byrne, Barrister-at-Law.

The Committee held their first meeting in private on the 24th January, 1922, in the Mansion House, Dublin. Michael Collins presided, and briefly outlined the work which lay before the Committee. In particular he stressed the fact that the proposed Constitution should fulfil four requirements—firstly, that it should provide for a free and democratic state; secondly, that it should be within the Treaty; thirdly, that it should provide for the particular position of the six North-eastern counties of Ulster; and fourthly, that it should provide certain safeguards for the old Unionist minority in the other parts of Ireland. He asked that a draft be submitted within twenty-eight days.

Collins was at that time both Chairman of the Provisional Government and Minister for Finance in the Dáil Ministry. He could not devote much time to the discussions of the Committee, and Mr. Figgis acted throughout the most of the time as chairman.

The members of the committee had naturally most experience of the British Constitution, but the Committee decided not to copy that constitution as of necessity nor to confine themselves to adapting it to the particular needs of Ireland. They determined to evolve a new constitution such as appeared best suited to the needs of the new Irish State, incorporating what appeared the best features of other constitutions. In particular, the Constitution of the United States of America, the Constitution of the Swiss Confederation and the new Weimar Constitution of Germany were very closely studied.

In accordance with the instructions of Michael Collins, the Committee submitted a draft within twenty-eight days. Subsequently two more drafts were produced by the Committee. These drafts were considered by the Dáil Ministry and the Provisional Government sitting together, and by a process of selection a fourth draft was evolved, containing what seemed best in the three previous drafts. None of these drafts has been made public, as the Government regarded them as confidential documents and declined to publish them, even when strongly urged to do so during the debate on the Constitution in the Constituent Assembly. This fourth draft was taken to London and shown to the British Cabinet.

II.—THE FINAL DRAFT CONSTITUTION.

It was essential that the Constitution of the Irish Free State should be in accordance with the terms of the Anglo-Irish Treaty, and in order that there should be complete agreement on this point between both parties to the Treaty the Provisional Government decided to show their draft to the British Government before submitting a Draft Constitution to the Constituent Assembly. The Britsh Government admitted publicly[1] that it was only through the courtesy of the Provisional Government, and not as of right, that they had been able to examine the draft constitution

[1] Mr. Churchill in the House of Commons, 15th June, 1922

before it was published by the Provisional Government. A further reason for taking this step was that an agreement had been come to between Michael Collins and Mr. de Valera, as leader of the Opposition in the Dáil, which provided, *inter alia*, that the Constitution should be presented to the People prior to the General Election, in a form that had definitely secured the approval of the British Government, in order that the People might know precisely what was the alternative to the Republic.

For various reasons the British Government were somewhat suspicious when the Irish Draft was shown to them, and insisted upon a very strict interpretation of the Treaty. The Draft brought across was altered in certain respects, principally it seems, as regards the form of the articles which dealt with the relations of Ireland to the Crown and to Great Britain. Article 2 of the Treaty prescribed that " . . . . the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."[2] The words " practice and constitutional usage " were inserted in this Article in order that Ireland might have the benefit of the great advances in constitutional status made by Canada since 1867, and have the same status as that country has now in fact; as distinct from the technical legal status of Canada as defined in the British North America Act, 1867.[3]

The Draft brought to London took it seems the synthetic product of the law, practice and constitutional usage, and set out the relations between the Crown and the Irish Free State accordingly. The British, however, interpreted the Treaty otherwise and held that the technical legal position should first be set down, and then qualified, where necessary, by a clause giving effect to the practice and constitutional usage. This view was eventually accepted by the

[2] *Vide* Appendix I.
[3] 30 Vic. ch. 3.

Irish representatives and a final Draft was made accordingly, differing somewhat in form, but not it would seem in substance, from the fourth Draft. This final Draft was issued for publication by the Provisional Government on the night of the 15th June, 1922, and was the Draft Constitution which, with the addition of five transitory provisions published a few days later, was submitted to the Constituent Assembly.[4]

The election for the Constituent Assembly or Third Dáil Eireann took place on the day following the issue of the Draft Constitution, and resulted in a majority in favour of the Treaty being returned. The Constituent Assembly was summoned by the Provisional Government to meet in Dublin on the 1st July, 1922,[5] but in the interval between the Elections and that date Civil War had commenced, and the meeting was prorogued on five different occasions. When at last it met on the 9th September, 1922, both Arthur Griffith and Michael Collins were in their graves and civil strife was raging in the provinces. The Anti-Treaty Party led by Mr. de Valera declined to take any part in the proceedings.

The Draft Constitution issued on the 15th July was subsequently adopted, in substance, by the Constituent Assembly and became the Constitution of the Irish Free State. It was, however, considerably modified in detail. The Preamble was completely changed, and of the seventy-one permanent articles of the Draft only thirty-nine are found unaltered in the Constitution.

The parts which called forth the most criticism, and where the greatest difference exists between the draft provisions and the provisions of the Constitution as subsequently enacted, were those articles[6] which dealt with the Executive Council. The scheme proposed in the Draft was an Executive Council responsible to Dáil Eireann, consisting of not more than

[4] *Vide* Appendix III.
[5] *Vide* Appendix II.
[6] Draft Articles 50 to 59.

twelve Ministers. Of these twelve Ministers, four at least, were to be members of Dáil Eireann. A number not exceeding eight was to be chosen from amongst citizens eligible to be elected to Dáil Eireann, but who were not, during their term of office, to be members of either House. A proviso was added that, upon occasions, a particular Minister or Ministers, not exceeding three, might be members of the Oireachtas in addition to the four members of the Dáil above mentioned. This meant that normally four members of the Executive Council would be members of Dáil Eireann and that eight would not be members of either House. Of the four, one was to be nominated President of the Executive Council by the Dáil, and the other three, including Vice President, were to be nominees of the President. The President and his nominees were bound to retire from office should the President fail to be supported by a majority of Dáil Eireann, and jointly they were to be exclusively responsible for all matters relating to External Affairs.

The Ministers not members of the Oireachtas, (normally eight in number), were to be nominated by a special Committee of the Dáil. The intention was that they should hold the portfolios concerned with the internal government of the country. They were to have all the privileges of members of the Dáil save that of voting, and their tenure was to be the term of the Dáil existing at the time. None of them could be removed from office except upon the report of a Committee of the Dáil that he had been guilty of certain specified offences. Apart from External Affairs, the Executive Council, as a whole, was to be a collective authority, while, at the same time, each of its members was to be individually responsible for the Department of which he was head.

These articles which provided for an Executive system entirely new and untested provoked so much criticism in the Constituent Assembly that a special committee was appointed to consider them, and this Committee deemed it necessary to recast completely

nine articles.[7] The Executive scheme provided in the Constitution, as enacted by the Constituent Assembly, was based on the re-cast articles of this Committee, and a recent amendment to the Constitution points to a further departure from the original scheme of the Draft.

III.—ENACTING THE CONSTITUTION.

The Assembly summoned by the Provisional Government met for the first time on the 9th September, 1922, and acted as the Third Dáil Eireann, but no oath was administered to or taken by the members. The clerk of the Assembly was the clerk of the second Dáil. The Assembly appointed a Ceann Comhairle, elected a President, and approved of a new Ministry nominated by the new President as the other Dála had done. This Ministry replaced both the Dáil Ministry and Provisional Government and acted in both capacities, and the system of dual government which had existed since the previous January formally ended when the new Ministry assumed office. In all official documents, etc., this Assembly is styled Dáil Eireann and the Preamble to the Constituent Act,[8] the most important act performed by it, commences with the words "Dáil Eireann sitting as a Constituent Assembly in this Provisional Parliament . . . ."

The debate on the Constitution commenced on the 18th September, 1922, and ended on the 25th October following. The Constitution formed the first Schedule to a Bill entitled "A Bill to enact a Constitution for the Irish Free State (Saorstát Eireann) and for imple-

[7] Articles 50, 51, 52, 53, 54, 55, 56, 57 and 59 of the draft. The arguments brought forward both in support of and against the scheme of the Draft Constitution will be considered at a later stage in discussing the Executive Power.

[8] The Constitution of the Irish Free State (Saorstát Eireann) Act, 1922. *Vide* Appendix IV.

menting the Treaty between Great Britain and Ireland signed at London on the 6th day of December, 1921."

The Bill was introduced by the President, William T. Cosgrave, and seconded by the Minister for Home Affairs, Kevin O'Higgins, who took charge, on behalf of the Government, of putting the Bill through all the stages prescribed by the standing orders.

The Assembly was informed that certain articles[9] were regarded by the Government as vital and that their rejection would involve the resignation of the Government. These were firstly certain articles which implemented the provisions of the Treaty concerning the position of the Crown and the relations of Ireland with Great Britain and the Imperial Parliament, and were in fact an agreed interpretation of those parts of the Treaty, and secondly certain other articles which embodied the substance of an agreement made in June, 1922, between Arthur Griffith and representative members of the Unionist minority. Several of these "agreed" articles were amended by the Assembly but none of them was altered in such a way as to affect what the Government regarded as its vital substance.

The Draft Constitution was discussed article by article. Both it and the Bill, as introduced, were printed in English only and practically the entire debate was conducted in that language. On the same day that the English version was finally adopted by the Constituent Assembly a version of the Constitution, in the Irish language, was formally approved as the official version and enacted by the Assembly without debate. In this respect the Constituent Act differs from the Acts passed by the Oireachtas up to the present, all of which have been introduced, and enacted in the English language only, after which a version in the Irish language has been prepared officially and published without being passed by the

[9] The articles in question were Articles 12, 17, 24, 36, 40, 41, 50, 58, 65, 67, 77, 79, of the Draft Constitution.

Oireachtas. It is to be regretted that the procedure adopted by the Constituent Assembly was not adopted in the case of the Amendments to Constitution made subsequently. In view of the spirit of the Constitution and of the great importance of the text of a written Constitution steps should be taken to have these and all further amendments enacted, like the original Constitution itself, in the National language.

In the interval between the passing of the Constitution by the Constituent Assembly and its coming into operation the British Parliament passed an Act[10] ratifying the Treaty of the 6th December, 1921, for the purpose of Articles 11 and 12 thereof, and incorporated in that Act the Constitution exactly as passed by the Constituent Assembly. The Government made it known to both the House of Lords and the House of Commons, that the Constitution, as enacted by Dáil Eireann, could not be changed by Parliament without the consent of the other party to the Treaty.

The Constitution was brought into operation on 6th December, 1922, as prescribed by the Eighty Third Article, by a Proclamation announcing the passing and adoption of the Constitution by the Constituent Assembly and the British Parliament,[11] and on the same day the British Commander-in-Chief and the last British troops marched out of the Irish capital.

IV.—THE NATURE OF THE CONSTITUENT ASSEMBLY.

The Assembly which was responsible for the framing and enacting of this Constitution merits a brief examination because of its works as well as because of its peculiar nature from a juridic point of view.

10 Irish Free State Constitution Act, 1922, Session 2 (13 Geo. V, ch. 2.).

11 *Vide* Appendix V.

It has been remarked that this Assembly bore three names each indicative of some aspect of its nature. Summoned by the Provisional Government as "the House of Parliament to which the Provisional Government shall be responsible," it consisted only of the elected members of the twenty-six counties, though certain of these were at the same time representatives of constituencies in the six counties. An oath of allegiance to the Irish Republic had to be subscribed to by the members of the first and second Dála before they were entitled to take part in the proceedings, but in the case of this Assembly no oath whatever was taken by the members. Nevertheless it proceeded to function as the third Dáil Eireann, and is so described in all its own official reports and publications.

These and many other anomalies of this period can only be explained by the fact that apart from whatever the two rival Governments and Legislatures which claimed to have paramount authority in Ireland, at the time of the Treaty, held, in theory, to be the position resulting from that Agreement both recognised that, in fact, there actually existed a kind of constitutional vacuum which would continue until the coming into operation of the new Constitution. Neither the British Parliament nor Dáil Eireann were absolutely free to legislate in practice in accord with their respective theoretical claims, and in point of fact neither did so, though each functioned during this period to a limited extent, and with the tacit approval of the other.

This body, known both as Dáil Eireann and as the Provisional Parliament, was also officially styled the Constituent Assembly. The use of such an expression calls to mind the classic distinction between the Constituent Power and the Legislative Power which has had so great an influence on constitutional theory, since the appearance of the Federal Constitution of the United States, on the 17th September, 1787.

At the end of the Eighteenth Century, the Americans distinguished clearly between and separated in practice the Constituent Power and the ordinary Legislative Power. Both these Powers were confided to representatives, and not exercised directly by the People, but the distinction existed because the representatives in the two cases were different.

This distinction, though apparently not perceived by either Montesquieu or Rousseau, strongly influenced the constitution makers of the French Revolution. Condorcet, the celebrated framer of the "Girondin" Constitution of 1793, treats of this American theory of the Constituent Power,[12] and the distinction is likewise proclaimed by Sieyes.[13]

The principle was adopted, in practice, by the Assemblée Constituante, and later by the Convention, in the Constitution of the 5th Fructidor Year III which adopted the radical and complete separation of the two Powers in conformity with the American theory. The previous constitutions had not gone quite as far, in as much as although the Legislative Assembly could not set itself up as a Constituent Assembly, on the contrary, they admitted that a Constituent Assembly might pass ordinary laws, in exceptional circumstances, as was actually done by the Assemblée Constituante. The Constitutions of the Year VIII, 1848, 1852, and the present French Constitution of 1875, continued the traditional separation of the two Powers.

This principle is recognised by a great number of modern constitutions and by practically all European Constitutions adopted since the Great War, although many of the Assemblies which enacted these post-war Constitutions were compelled by necessity, as

[12] *Lettres d'un bourgeois de Newhaven á un citoyen de Virginie.*
Letires d'un citoyen des Etats-Unis á un Français sur les Affaires presentes.

[13] *Qu' est ce que le tiers?*

was the Assemblée Constituante of the French Revolution, to pass ordinary legislation dealing with urgent matters arising out of the great upheaval.

Herein lies the chief interest of the Constituent Assembly or Dáil from a juridic standpoint. Although called "Dáil Eireann" and "Parliament," each a term ordinarily indicative of a Legislative Assembly this body did not perform a single act of ordinary legislation. During the period that the Constitution was being debated as well as during the interval which elapsed between the adoption of the Constitution and its coming into operation, all urgent matters were dealt with by means of resolutions sanctioning and approving of Decrees and Orders of the Provisional Government covering these urgent matters. The estimates for the financial year 1922-23 were considered by the Assembly sitting in Committee. A vote on account was passed in each case to cover the period until 6th December, 1922, and a recommendation made that the full estimates of the necessary sum be adopted in due course by the Oireachtas. After passing the Constitution, several Bills were introduced and debated in the Constituent Assembly, but not passed as legislative measures, the procedure adopted being that of a resolution stating that the Assembly was of the opinion that the measure in question was desirable, and instructing the Ministry to embody same in a Bill to be laid before the new Oireachtas.

The Eighty-First Article of the Constitution provided that the Assembly might, subject to compliance by the members thereof with the provisions of the Seventeenth Article of the Constitution act as the Dáil of the first Oireachtas, for a period not exceeding one year from the coming into operation of the Constitution, and as a matter of fact the personnel of the Constituent Assembly did in this manner constitute the first Dáil under the new Constitution. The procedure outlined, enabled these measures already introduced and debated to be passed formally by that House, without further debate.

Long discussions took place at the commencement of the session of the Constituent Assembly as to its powers. Deputy Johnson, the Labour leader in the Assembly, quoted a letter he had received from Arthur Griffith in which the latter stated: "This Assembly will be a sovereign body, and no one recognizes more clearly than I that it is not for us to bind or diminish its sovereignty in advance. Clearly, an Assembly empowered to pass and prescribe a Constitution has also title to pass and prescribe it in the form most agreeable to itself."[14] The Minister of Agriculture stated: "No one denies that this is a Sovereign Parliament. It is completely sovereign."[15] This view as regards the sovereignty of the Assembly was that taken by all the parties represented there, but whereas some declared that both in practice and in theory the Dáil "was to have legislative as well as constituent powers," the majority took the view that the Assembly was perfectly free to enter on any course of legislation which it might propose to itself, so far as theory was concerned, but that nevertheless so long as it chose to accept the Treaty decision of the previous Dáil that decision imposed a practical limitation, the chief consequence of which was that the Dáil was there to draft a Constitution in accordance with the Treaty and not to pass ordinary legislation unless, as the Minister for Local Government put it, it chose "to exercise the inherent inalienable and indefeasible power it has to repudiate the Treaty."[16] This viewpoint was formally expressed by the Dáil by a resolution adopted on the 19th September, 1922.

The Constituent Assembly observed, in its own practice, the rigid and absolute separation between the constituent and legislative powers, as formulated in American Constitutional theory, a distinc-

[14] *Dáil Eireann (Parlimint Sealadach) Parliamentary Debates.*
[15] Ibid. p. 435.
[16] Ibid.

tion which it also incorporated in the provisions of the new Constitution.

This Constituent Assembly and its work is of juridic interest from another point of view. The Treaty made Ireland a co-equal member of the community of Nations forming the British Commonwealth of Nations. The other members of this Commonwealth, in addition to the United Kingdom, prior to this event, were the Dominion of Canada, the Dominion of New Zealand, the Commonwealth of Australia, and the Union of South Africa, Newfoundland being also sometimes reckoned a member. None of these except Great Britain having been sovereign, at its origin at all events, was able to enact a constitution for itself. The Canadian Constitution was prepared by a group of colonial statesmen in 1864, and enacted in 1867 by the British Parliament in the "British North America Act, 1867."[17] An elective Legislature was bestowed on New Zealand by an Act of the British Parliament in 1852.[18] A draft Federal Constitution of Australia was prepared in Australia and agreed to by a vote of the people in every colony but the actual Constitution, which differs in one respect from the draft, is the "Commonwealth of Australia Constitution Act"[19] passed by the British Parliament in 1900. Similarly the present Constitution of the Union of South Africa is an Act of the British Parliament entitled the "South Africa Act, 1909."[20] The Irish Constitution of 1922 differs from all of these in that was decreed and enacted by an Irish Constituent Assembly acting as a sovereign body. The British Parliament, it is true, on the 5th December, 1922, passed an Act entitled the "Irish Free State Constitution Act, 1922,"[21] formally ratifying the Treaty for the purpose of Articles 11 and 12 thereof and incorporated therein, without alteration of any kind, the

[17] 30 Vict. ch. 3.
[18] 15 & 16 Vict. ch. 72.
[19] 63 & 64 Vict. ch. 12.
[20] 9 Edw. VII, ch. 9.
[21] Sess. 2, 13 Geo. V, ch. 2.

Constitution, as enacted by the Constituent Assembly some weeks previously; but it is to the Act of the Constituent Assembly[22] that the Irish Courts have regard, and "the Constitution" is always interpreted by the Irish Courts as meaning the Constitution set forth in the Schedule of the Act of the Constituent Assembly.[23]

[22] Constitution of the Irish Free State (Saorstát Eireann) Act, 1922. [No. 1 of 1922.]

[23] It is worthy of note that in the cases from Ireland, which came before the Judicial Committee of the Privy Council, when any question involving the Constitution arose, it was to the Saorstát Eireann Act [Number 1 of 1922] that reference was made.

CHAPTER III.

THE SPIRIT OF THE CONSTITUTION.

I.—THE MONARCHICAL ELEMENT.

"THE Commonwealth founded in America was only called a Republic because it had no hereditary King, and it had no hereditary King because there were no means of having one."[1] Sir Henry Maine uses these words in an essay which he devotes to a study of the Constitution of the United States. The converse might be said with truth of the Irish Free State. It was only called a Free State because it had no elective head, and it had no elective head because there were no means of having one, in accordance with the Treaty. Article 1 of the Treaty committed Ireland to membership of the British Commonwealth of Nations, and involved the acceptance of the head of that Commonwealth as titular head of the Irish State. The Treaty between Great Britain and Ireland was the basis on which the political edifice of the new Irish State had to be reared, and it prescribed the limits within which the Irish Constitution had to be evolved, but there is little doubt that, had there been no Treaty to limit the Constituent Assembly in its decisions, the new Irish State would have been called a Republic.

This fact is a cardinal one and helps to an understanding of the spirit in which the Constitution was designed. It was wrought by Irishmen in Ireland, except in regard to those matters specifically determined by the Treaty. Viscount Peel speaking on the 15th March, 1922, in the House of Lords, as

[1] Maine. *Popular Government,* p 210 London, 1885.

spokesman of the British Government made this very clear when he stated "it should be absolutely clear in every particular that it is not an article of British manufacture, but that it is wholly Irish, and that even the finishing touches have not been introduced in this country."[2] The Crown, i.e., H.M. King George V, his heirs and successors, is declared to be a part of the Legislature, and to be invested also with the Executive Authority of the State. It is represented by the Governor-General who is empowered to do all requisite acts in the name of the Crown.

Whatever powers the Crown has and exercises in the Saorstát are derived from and exercised by virtue of the Constitution in the same manner as the President of the Reich or the King of the Belgians derive their authority from the German and Belgian Constitutions respectively. The Crown was not a part of the Constituent Assembly which enacted the Constitution.

The oath to which every member of the Oireachtas and of the Government is required by the Constitution to subscribe, was prescribed by Article 4 of the Treaty, and excited more controversy than any other provision. It was condemned by the opponents of the Treaty as an oath of allegiance to the King of England, and resulted in the second largest political party remaining outside the Dáil until August, 1927, by their refusal to subscribe to the oath before entering the Dáil.

The Anglo-Irish Treaty was a compromise and involved concessions by both parties. The concessions made by the British side involved the disruption of the State which had existed since 1801 under the title of the United Kingdom. The Treaty replaced this by two distinct states—one Irish, the other British. In return for this, the Treaty preserved the integrity of the Community of Nations called the British Commonwealth, and provided that Ireland should become a member of that community. To this concession on the Irish side are traceable whatever monarchical elements we find in the Irish Constitution. Further-

[2] *Lords Debates*, Vol. 49, p. 515.

more it is to this membership of a common League that the words "the common citizenship of Ireland with Great Britain" found in the oath have reference. There is no "common citizenship" in the proper sense of the word, and no common state which includes both countries. Strictly speaking the oath is an oath of allegiance to the Constitution of the State in the first place, and of fidelity to the Crown as head of the British Commonwealth of Nations in the second place.

By the Eighty-third Article the Constitution was made to come into operation on the issue of a Royal Proclamation, announcing the passing and adoption of the Constitution.[3]

II.—THE REPUBLICAN ELEMENT.

The work of the Assembly and of the Constitution Committee was influenced by a desire to produce an instrument which, while conforming to the stipulations of the Treaty, would approximate as closely as possible to a Republican Constitution. Thus we find that the official title of the State in the Irish language, Saorstát Eireann, which is the form of title generally employed and which is embodied even in the English text of the Constitution is the title by which the Irish Republic was designated in the Declaration of Independence of 1919 and in other official documents. This is a curious parallel to the German Constitution of 1919 in which the new German Republic is given the same title as was formerly applied to the German Empire. Dáil Eireann is continued in being as the first Chamber of a bi-cameral legislature. The Fifth Article prohibits the conferring of titles of honour on any citizen in respect of any services rendered in relation to the Saorstát, except with the approval or upon the advice of the Executive Council. Throughout the British Commonwealth the conferring of titles is one of the prerogatives of the Crown, and as Article

[3] *Vide* Appendix V.

2 of the Treaty bound Ireland to accept the same relationship to the Crown as that of Canada it was not possible in conformity with the Treaty formally to prohibit the conferring of titles, as this would have been objected to as an encroachment upon an existing prerogative. But this Article of the Constitution provides that, in practice, such things will be unknown in the Saorstát, and thereby achieves the same object, by making the prerogative exercisible only on the advice of the Irish Government. "Nothing need be said to illustrate the importance of the prohibition of titles of nobility," wrote Alexander Hamilton in one of his famous letters to the People of New York, "This may truly be denominated the cornerstone of republican government, for so long as they are excluded there can never be serious danger that the government will be any other than that of the people."[4] The same republican influence is seen in the Eleventh Article the effect of which is to vest in the Saorstát all the lands and waters, mines and minerals formerly vested in the British Crown. The Fifty-Second Article provides that the head of the Executive Council and his deputy shall be styled President and Vice-President respectively.

The spirit of a Constitution may often be seen more clearly in its workings and in the institutions which grow up and flourish under it than in the cold print of its text. The Republican element in the texture of the Irish Constitution becomes more marked when we regard the institutions which have come into being under it.

The National Flag, used officially in the State and abroad, is the green, white and orange tricolour of the revolutionary republic. Like France and the United States which have both adopted as their National Anthems airs which inspired their soldiers of revolution days the new Irish State honours as its National Anthem the favourite marching tune of the Irish Volunteers.

[4] *The Federalist*, No. 84

The National Army bears the same official title and crest as those formerly used by the Volunteers, acting as the Army of the Irish Republic. Still more significant, the Command-in-Chief of all armed forces of the state is declared, by statute, to be vested in the Executive Council.[5]

Suits brought in the other parts of the Commonwealth, in the name of the King, are in the Saorstát instituted in the name of the Attorney-General. Members of the Inner Bar, called by the Chief Justice, bear the title of Senior Counsel in lieu of the older title of King's Counsel.

The oaths taken by the Judges, by Officers and Soldiers of the Army, and by other Officers of the State are to Saorstát Eireann and its Constitution, the King not being specifically mentioned. The Crown, the symbol of Royal Authority, does not appear on the State Arms nor on any of the official crests or seals. None of the Irish stamps bear the Crown or Royal effigy, and this is also true of the new coinage which has just been issued. Probably in no other state where the titular head is a hereditary King are so many functions of government exercised by an elective body or so many acts done in the name of the *res publica*, as distinct from its titular head.

III.—THE DEMOCRATIC ELEMENT.

Michael Collins in his address to the members of Constitution Committee, at their inaugural meeting, had laid stress on the fact that one of the requirements of the future Constitution was that it should be democratic. It scarcely needs to be mentioned that the terms Republic and Democracy have not the same intension, or that the fact that the Constituent Assembly were opposed to monarchical forms and

[5] Defence Forces (Temporary Provisions) Acts, 1925 to 1928.

institutions would not necessarily mean that they favoured democratic institutions.

Lord Bryce, speaking of this distinction, has said: "But though we cannot define either Oligarchy or Democracy, we can usually know either the one or the other when we see it. Where the will of the whole People prevails in all important matters, even if it has some retarding influences to overcome, or is legally required to act for some purposes in some specially provided manner, that may be called a Democracy. In this book I use the word in its old and strict sense, as denoting a government in which the will of the majority of qualified citizens rules, taking the qualified citizens to constitute the great bulk of the inhabitants, say, roughly three-fourths, so that the physical force of the citizens coincides (broadly speaking), with their voting power."[6] Judged by such a criterion as this, and it is one proposed by an admitted authority on such matters, the Irish Constitution of 1922 fulfils the requirements of a democratic constitution.

The Second Article reads as follows: "All powers of government and all authority legislative, executive and judicial in Ireland, are derived from the people of Ireland, and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with this Constitution." This Article is a solemn recognition of the sovereignty of the Irish people and accepts in general terms the theory known on the Continent as the theory of National Sovereignty. It determines or defines the People whose will is to prevail within the four corners of Ireland. It is, at the same time, a mere declaratory clause, and in such matters facts are of more importance than the form of words. We may, therefore enquire whether the Constitution does ensure that the will of

6 Bryce. *Modern Democracies.* Vol. 1, p. 25. London (1923).

the Irish people shall prevail in all important matters, that the will of the majority of qualified citizens shall rule.

The Third Article sets out the conditions of citizenship. "Every person without distinction of sex domiciled in the area of jurisdiction of the Irish Free State (Saorstát Eireann) who was born in Ireland or either of whose parents were born in Ireland, or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years is a citizen of the Irish Free State. . . . ." The Act of the British Parliament ratifying the Treaty for the purpose of Article 11 was passed on the 5th December, 1922, consequently by virtue of Article 11 of the Treaty the area of jurisdiction of the Irish Free State did not include six of the Counties of Ulster on 6th December, 1922, the day upon which the Constitution came into operation; and as the address specified in Article 12 of the Treaty was duly presented some days later, the six parliamentary counties of Antrim, Armagh, Down, Fermanagh, Derry and Tyrone have continued, down to the present, to be outside the area of jurisdiction of the Irish Free State. The Third Article of the Constitution confers citizenship of Saorstát Eireann firstly on every person of Irish birth or parentage domiciled in any part of Ireland other than these six counties, on 6th December, 1922. Thus even persons of Irish birth who had been abroad in other countries for many years, but who had the intention of returning eventually, have Irish citizenship conferred on them. Secondly it confers Irish citizenship on every person even though not of Irish birth or parentage ordinarily resident in any part of Ireland other than these six parliamentary counties for at least seven years prior to that date, except where such citizenship is declined in favour of citizenship of another state already possessed.

To these persons, living at the date on which the Constitution came into operation and on whom the Constitution itself directly conferred Irish citizenship,

must be added children born within the territory of the Saorstát of parents who are Irish citizens.

The Constitution lays down no rules regarding naturalisation of foreigners or the termination of Irish citizenship, but leaves these and kindred matters to be determined by legislation. No law has yet been made by the Oireachtas, nor has the question of citizenship yet come before the Courts In such circumstances it is impossible to forecast whether the Saorstát will adopt the Roman system of nationality *jure soli* and regard all persons born within its territory as Irish citizens, or the newer French principle of nationality *jure sanguinis*, i.e., that a child follows the nationality of his parents—and claim as Irish citizens all children of parents who are Irish citizens, including those born in foreign countries.

The question of who are "qualified citizens," in the sense in which that term is used by Lord Bryce is dealt with by the Fourteenth Article. By that Article every citizen, without distinction of sex, who has reached the age of twenty-one years is given the right to vote for members of Dáil Eireann and to take part in the Referendum. No citizen may exercise more than one vote at any election, and voting is by secret ballot. In effect this Article secures that the will of the majority of the citizens cannot be frustrated. The Constitution ensures, as will be seen later, that neither the Executive nor the Seanad can of themselves defeat the will of the Dáil, in the matter of legislation.

The Constitution provides that all matters of legislation in the Dáil shall be determined by a majority of the votes of the members present, the quorum necessary to constitute a meeting of the Dáil being twenty members. A Bill passed by a majority of the People's representatives in the Dáil, unless it be *ultra vires* the Constitution, must eventually become law, notwithstanding the opposition of the Seanad or of the Executive. In other words, the citizens who

elect Dáil Eireann and who express their will by the Referendum are the "qualified citizens" of Saorstát Eireann. They constitute the great bulk of the inhabitants of the State, and the will of the majority of these qualified citizens is, by the Constitution made supreme in the last resort. A broader franchise could scarcely be imagined The Fifteenth Article makes every citizen who has reached the age of twenty-one years and who is not placed under disability or incapacity by the Constitution or by Law eligible for election to Dáil Eireann, and as a consequence eligible to be a member of the Executive Council.

The conception of Democracy of the framers of the Irish Constitution was however broader than that which is connoted by that term taken in its strict and classic sense. Democracy, in their eyes, was the product of Equality and Freedom, as well as their guardian. Their conception might perhaps be expressed in the terms of the two first articles of the famous Declaration of the Rights of Man and of the Citizen of 1789.[7] Two things appeared to them essential, that the Constitution should recognize a fundamental equality of all citizens and that it should guarantee the maximum of personal liberty to every citizen. The sole restrictions to be imposed on this liberty of the citizen were such as should be imperatively dictated by the necessity of preserving the national existence.

In devising the means of securing this Equality and Freedom to all Irish citizens they showed themselves prepared to tap every source of political experience. They showed no prejudice with regard to British experience such as Sir Henry Maine accuses,[8]

[7] "I.—Les hommes naissent et demeurent libres et egaux en droits; les distinctions sociales ne peuvent être foundées que sur l'utilité commune." "II.—Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme; ces droits sont la liberté, la propriété, la sûreté et la resistance à l'oppression."

[8] Maine. *Popular Government*, p. 206. London (1885).

perhaps somewhat unjustly, Hamilton, Jay and Madison of exhibiting in the "Federalist." Like the delegates in the Federal Convention they understood Great Britain better than any country except their own. Yet they had no sentimental admiration for the British frame of Government. Their choice of provisions was governed only by their judgment of their suitability to Irish conditions.

A number of Constitutions, drawn from four continents, ranging from the Eighteenth to the Twentieth centuries, and including every type of State were studied. Special attention was devoted to the new Constitutions enacted after the Great War since they were rightly considered as having garnered the experience of generations

The provisions of the Constitution which guarantee the liberty of the individual and the equality of citizens are nearly all found amongst the first eleven Articles, and it is worthy of note that these Articles formed the first section of the draft constitution under the heading "Fundamental Rights."[9] Of these eleven Articles six are concerned with securing that Equality and Freedom to which reference has been made. The Third Article, after defining Irish citizenship, prescribes that every citizen "shall within the limits of the jurisdiction of the Saorstát enjoy the privileges and be subject to the obligations of that citizenship." The Sixth Article declares the liberty of the person to be inviolable and forbids any person to be deprived of his liberty except in accordance with law. Believing in the fundamental importance of this liberty of the person and realising at the same time how easily bare declarations of rights can be flouted, the Constitution makers provide in the same article the means for defeating attempts to render this right nugatory. The principle by which

9 *Vide* Appendix III. This and all other headings, save one "Transitory Provisions," were subsequently deleted by the Constituent Assembly for fear that difficulties might later arise through the Courts construing them as parts of the Articles.

the liberty of the person is secured—namely, Habeas Corpus, is one taken from the British Constitution. The Constitution makes it obligatory on each and every judge of the High Court, to whom complaint is made that a person is being detained contrary to the law, at once to investigate the complaint, and for that purpose empowers each to order the body of such person to be brought before him. Unless it be established that the detention is in accordance with the law it is mandatory on the Judge to order the release of the person detained.

The proviso to the effect "that nothing in this Article contained shall be invoked to prohibit, control or interfere with any act of the military forces of the Irish Free State (Saorstát Eireann) during the existence of a state of war or armed rebellion," did not appear in the Draft, but was inserted as an amendment. It was very strongly opposed in the Constituent Assembly, amongst others by the Vice-Chairman of the Constitution Committee. It was agreed however that circumstances might arise where the National existence might be endangered and a choice have to be made between the liberty of the Nation and the liberty of the individual. In England, in such circumstances, acting on the principle, "salus populi suprema lex," the Courts have always held it to be their duty not to interfere with Officers of the Crown in taking such steps as they deem necessary to restore peace and order, and that they have no jurisdiction to question, while war or rebellion is still raging, any acts done by the Military Authorities. The amended Article simply adopted, in its entirety, the law of the British Constitution on this matter. No loophole was thereby created by which the principle of Habeas Corpus can be evaded, outside of these circumstances, in as much as it is the Ordinary Courts of Justice that judge of the existence or non-existence of a state of war or rebellion.

The Seventh Article declares the dwelling of each citizen to be inviolable, and not to be forcibly entered

except in accordance with law. It is almost identical with Article 115 of the German Constitution of 1919.[10]

The provisions embodied in most of the post-war constitutions and in the Constitution of the United States guaranteeing freedom of conscience and liberty of faith to all citizens and forbidding the Legislature to interfere with this right in any way, are embodied in the Irish Constitution by the Eighth Article. Every citizen has the right of free expression of opinion guaranteed to him by the Ninth Article. This Article also embodies the substance of Articles 123 and 124 of the German Constitution of 1919, which guarantee the right to assemble peaceably and unarmed, and the right of forming unions and associations.

The Equality of Citizens and Liberty of the Person which these Articles are intended to secure to every citizen are sought to be rendered still more secure by the adoption in the Sixty-Fifth Article of one of the most happy provisions of the American Constitution—namely, judicial "control of the constitutionality" of all laws, whereby the duty of interpreting the Constitution, as well as the laws made under it, is confided to the Courts of Justice. Whatever objections may be raised to this control on the grounds of possible obstruction of the Executive, it is generally admitted by those who have studied its working in the United States, where it originated and has been tested for the longest time, that this control of constitutionality acts as a powerful safeguard of individual liberties.

IV.—THE GAELIC ELEMENT.

"Ireland, not Free merely but Gaelic as well, not Gaelic merely but Free as well," was a slogan often used in the years preceding the Treaty. It crystal-

[10] Article 115. The residence of every German is an inviolable sanctuary for him; exceptions are admissible only in virtue of laws.

lised in a phrase the two chief aims of Ireland's struggle in recent years, firstly to achieve her political independence and secondly to recover her intellectual freedom, to take up the threads of the old Gaelic tradition, broken almost irreparably at the Battle of Kinsale,[11] to retrieve whatever could be saved of the old Gaelic polity, and to adapt it, as far as possible, to the needs of the twentieth century. The Battle of Kinsale appeared to seal the fate of Gaeldom. From that time the Irish language, the shrine of the National Genius, its literature and its song was finally outlawed and banished from the Palace, the Forum and the Courts. Despised and scorned by the ruling classes, it became the language of a poverty-stricken peasantry, and after the Great Famine of "Black '47" the decay of the old tongue became so widespread and rapid that its final extinction seemed at hand.

A movement to restore the Irish language to its proper place in the life of the Nation began in the early nineties of the last century and made astounding progress. From the ranks of the movement sprang the Chiefs of the Volunteers and the leaders of a revolutionary movement, and the restoration of the language became an accepted article of the National Creed. Its recognition in the New Ireland is found in the Fourth Article of the Constitution, which declares the Irish Language to be the National Language, and makes it the legal right of every citizen to use it on all occasions and in every circumstance where formerly the English language alone might be employed. It may be employed as of right in all proceedings of either House of the Oireachtas. Its use is sanctioned in the Courts of Justice, and a knowledge of it is gradually being made obligatory in all branches of the Public Services.

Few things were more remarkable in the old Gaelic polity than the honour and esteem in which Learning was held. The "Ollamh" or Professor ranked, in a Society remarkable for its rigid hierarchy, next to the Prince, by virtue of his Learning alone. "Educate

[11] 4th January, 1602.

that you may be free" had been the battle-cry of Pearse and Griffith and the other national leaders in the times when freedom seemed a forlorn hope. Modern Ireland, compared with most of the nations of Europe, may be said to be almost devoid of traditions, so few are those which have survived the blight of foreign rule. The idea that, as in the old Gaelic State, Learning should, in the new Ireland, be accessible to everyone was an accepted part of the Irish conception of Democracy. The Tenth Article of the Draft, which is identical with the Tenth Article of the Constitution, sought to give expression to this idea by making it a fundamental right of every child to receive at least an elementary education. Amendments were proposed on the lines of the provisions relative to Education contained in the German Constitution of 1919,[12] and in the Polish Constitution of 1921.[13] In particular it was sought to embody in the Article the principle of compulsory attendance at school up to a certain age. After considerable discussion the Constituent Assembly rejected this last proposal chiefly on the grounds that it clashed with what it considered a fundamental principle—namely, that the right and duty of educating children belongs to their parents, and provided that the parents are capable of discharging their duty and do so at home, they may not be compelled to send their children to a school. In the end the article was adopted as it stood enshrining a valuable right, but deliberately left vague and general, as it was considered that that Assembly should not undertake to define what constitutes a sufficient education or to lay down a common standard of education, but that such matters would be more easily and properly dealt with by way of ordinary legislation.

To sum up we may say that the Irish Constitution, is a hybrid in nature; monarchical in external form, republican in substance and withal essentially democratic. The monarchical element predominates in

[12] Articles 144, 145, 148.
[13] Article 118.

the letter of the constitution, the republican in its matter. Both are set in and bound together by a democratic frame, embodying practically every safeguard for individual liberties, except the legislative Referendum, and every provision for securing political equality amongst citizens which constitutional experience has proved to be of real worth, and devised in the spirit that the "will of the people" should never be capable of being thwarted on any issue of importance.

CHAPTER IV.

THE LEGISLATIVE POWER.

IT has been very truly remarked that whilst the earliest Constitutions, whether monarchical or republican, place the weight of power in the executive; constitutions of the nineteenth century tend to transfer this predominance of power to legislative bodies, whereas the tendency of recent Constitutions is to encourage more and more the intervention of the People themselves. The Irish Constitution, as adopted in 1922 exhibited this feature of the direct intervention of the People with regard to Legislation, that is to say the passing of ordinary laws, and with regard to the exercise of the Constituent power. Unlike most of the American State Constitutions[1] it did not provide for their intervention in connection with the Judicial Power, nor did it give to the People a direct control over the Executive.

The Irish Constitution, as originally enacted, divided the Legislative Power between two bodies, a legislative organ, known as the Oireachtas, and the People, that is to say the qualified citizens of Saorstát Eireann, but a recent amendment has withdrawn this power from the People, and vested it exclusively in the Oireachtas.

I.—THE OIREACHTAS.

The Oireachtas consists of the Crown and two Houses known respectively as Dáil Eireann and Seanad

1 *Vide* Bryce. *Modern Democracies.* Vol. II., pp. 89 ff, and 422-4. London (1923).

Eireann. The Oireachtas must hold one session at least each year, and it is summoned and dissolved by the representative of the Crown, acting on the advice of the Executive Council. "The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Eireann)" is, by the Twelfth Article, declared to be vested in the Oireachtas. The words "sole and exclusive" did not appear in the Draft Constitution. They were inserted by the Constituent Assembly in order to exclude any possibility of the British Parliament asserting a theoretical legal right to legislate for the Saorstát. In the Dominions mentioned in Articles 1 and 2 of the Treaty, the British Parliament has such a theoretical legal right, though by what Dicey calls a "convention of the constitution"—i.e., constitutional usage, this power no longer exists in reality. Article 2 of the Treaty entitled Ireland to take advantage of all constitutional usages governing the relationship between the British Parliament and Canada, and the insertion of the words, "sole and exclusive" in this article, which was suggested by Professor Berriedale Keith,[2] was made in order to convert into a constitutional right, that which existed in Canada, merely by virtue of constitutional usage.

The Constitution expressly forbids the passing of certain kinds of legislation. The Eighth Article, in order to guarantee freedom of conscience to all citizens, prohibits the making of laws to endow any religion or discriminate in any way between citizens on account of religious belief. This Article in effect embodies Article 16 of the Treaty. The Forty-Third Article prohibits the passing of *ex post facto* legislation. Consequently unless and until these Articles are amended the legislative power in the Saorstát does not extend to these matters.

The Forty-Sixth Article gives to the Oireachtas the exclusive right of raising and maintaining military forces in the territory of the Saorstát, and places all

[2] *Vide The Times*, 19th June, 1922.

such forces under its control. This does not affect the facilities granted to the British Government by Article 7 of the Treaty; to retain the harbour defences of Berehaven, Cobh (Queenstown), Belfast Lough and Lough Swilly, because Section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922,[3] of which the Constitution is the first schedule, gives force of law to the Treaty and provides that the Constitution shall be construed with reference to the Treaty.

The Forty-Ninth Article vests in the Oireachtas a power similar to, though not identical with, that vested in the Congress of the United States, by the First Article of the Federal Constitution which vests in the Congress, and not in the President, the power to declare war. It declares that " Save in the case of actual invasion, the Irish Free State (Saorstát Eireann) shall not be committed to active participation in any war without the assent of the Oireachtas." The power thus confided to the Oireachtas acts as a double safeguard. Firstly it removes from the Executive, the power of committing the country to war against the wishes of the majority of the citizens, a power which so many Governments in other countries possessed in the past and do still possess, despite the lessons of History. The Constituent Assembly showed itself unanimous in its determination that such a power should not be exercisible by any Irish Government. Indeed many of the members felt that the safeguard provided was not sufficient and desired to see the power here given to the Oireachtas, confided exclusively to the People themselves. It was proposed that the assent of a majority of the voters on the Register, obtained on a Referendum should be substituted for the assent of the Oireachtas. However, the majority of the Assembly felt that the collective judgment of Dáil Eireann and Seanad Eireann could, in the future, be trusted to pronounce aright on any issue of peace or war that might arise. Further they

[3] Number 1 of 1922.

realised that the delay imposed by the necessity of holding a Referendum might well jeopardise the national safety, and that a more speedy method of "feeling the pulse" of the People was essential, and the proposal was defeated.

A second danger required to be guarded against, a graver and more probable danger than that of an native Government committing the Nation to war against its will. This danger arose from the association of Saorstát Eireann with the British Commonwealth of Nations.

Up to 1914 a declaration of war by the Crown as King of Great Britain involved, *ipso facto*, in that war all the members and parts of the British Empire. After the Great War had terminated, certain of the Dominions, Canada in particular, asserted the claim that in the future no declaration of war by the Crown could commit them to send troops or otherwise actively to participate in any war, unless by their own free will.[4] This question was all the more vital in the case of Ireland, because of her geographical position, her proximity to the storm centre, and because of the facilities which the Treaty committed her to grant to Britain.

The Constituent Assembly bound as they were by Article 2 of the Treaty to conform to the Canadian position, could not declare categorically that a declaration of war by the Crown in Great Britain should in no wise, even in theory, affect Saorstát Eireann, because up to that time Canada had claimed no more than the right not to be committed against her will to active participation in a war involving Great Britain. They determined, however, to permit no doubt to remain as regards the practical aspect of the matter, the authority entitled to decree that Irish blood and treasure should be sacrificed in a foreign war.

It is a matter of considerable difference of opinion as to whether or not a Declaration of War by Great

[4] Keith. *Responsible Government in the Dominions*. Vol. II., p 904. Oxford (1928).

Britain against another state to-morrow would create a state of war between the Saorstát and that other state. It would seem however that it would not do so now. Dealing with the relations between members of the Commonwealth and states outside that Commonwealth the Report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926, states[5]— "We felt that the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the other members could be committed to the acceptance of active obligations, except with the definite assent of their own governments." If, however, a Declaration of War by Great Britain were, *ipso facto*, to put the Saorstát in a state of war with Great Britain's enemy it would be quite impossible for the Saorstát, apart altogether from any action on the part of Irish Naval or Military Forces, not to be committed thereby, by virtue of International Law, to the acceptance of active obligations and to the loss of very definite privileges. It is difficult to imagine a modern State in a state of war with another, theoretically or otherwise, and not thereby committed "to the acceptance of any active obligations."

If we consider a case in point the truth of this assertion becomes manifest. If Britain were at war with another Power and in the course of hostilities military planes of both Powers made forced landings in Irish territory, the Irish Government would be compelled to choose between interning or releasing both planes and their crews or releasing the British plane while interning the other. If the former course were adopted there could be no question but that the Saorstát would be in fact and in theory, a Neutral State. If the latter course were adopted it can scarcely be doubted that its effect would be at once to involve the Saorstát in active hostilities with Britain's enemy.

[5] Imperial Conference, 1926. *Summary of Proceedings*, p. 26. London.

Besides, the Report of the Conference emphasises that it is now settled that no member of the Commonwealth can be bound by a Treaty concluded by another member, save by its own consent. But this becomes an absurdity if all the other members of the Commonwealth are bound by a declaration of war by Great Britain, the *casus belli* being possibly some provision of a Treaty, which none of them has even signed.

If the sentence of the Report quoted means anything, and the personnel and status of the body responsible for the report forbids one to think that it did not mean exactly what it says, it is clear that only the Oireachtas can sanction a declaration of war involving Saorstát Eireann in any way.

General Hertzog speaking as the head of the Government of South Africa, in the Union Parliament repeatedly asserted, during the Debate on the Report of the Imperial Conference, that the Union could, as of right, declare her neutrality in the case of any future war. Mr. Desmond Fitzgerald, speaking in Dáil Eireann in his capacity of Minister of External Affairs, upon this same report asserted that "the general attitude of the Saorstát Government is that we should not be committed even to passive obligations except by our own definite act."

A further complication arises, however, in the case of the Saorstát from the fact that by Article 7 (b) of the Treaty it is agreed that the Irish Government shall afford to the Forces of Great Britain, in time of war or of strained relations with a Foreign Power, such harbour and other facilities as the British Government may require "for the purposes of such defence as aforesaid." It is not absolutely clear what is the defence here referred to, whether it is to the defence by sea mentioned in Article 6, or to the defence of the ports mentioned in the Annex to the Treaty, or to both. Neither does the Treaty specifically mention the facilities required. It is, therefore, somewhat difficult to judge how far the right to determine the attitude of the Saorstát in any war given to the Oireachtas by the Forty-Ninth Article, when construed

apart, is modified or abrogated by this clause of the Treaty.

The Constituent Act[6] makes it clear that the Treaty takes priority over the provisions of the Constitution where there is conflict between the two instruments. But the Treaty itself must be construed as a whole, and Articles 1 and 2 confer on Ireland a certain status in the British Commonwealth. Certain later provisions of the Treaty modify, in certain respects, this status. It is clear, however, that these provisions are intended to qualify that status and not to abrogate it or affect its essence. The undefined facilities mentioned in Article 7 (b) must therefore be such as will not abrogate the Saorstát's right not to be committed to the acceptance of active obligations as a belligerent against her will, this being unquestionably an essential element of the status referred to in Articles 1 and 2 of the Treaty.

It can hardly be maintained that this provision of the Treaty amounts to an agreement not to observe neutrality when Great Britain is at war with another Power. The facilities set out in the annex to the Treaty and granted to Great Britain, even in peace time, do not of themselves constitute a *casus belli* in the present state of International Law, and as an American jurist has recently pointed out[7] although China leased Shantung to Germany when Japan entered the war against Germany she attacked Shantung, but this did not involve China in a war with Japan.

It is clear from the debate on the Treaty in the Dáil that the Irish Plenipotentiaries did not agree to waive this right on behalf of Ireland. It is also noteworthy that Mr. Bonar Law, then British Prime Minister, stated on the 27th November, 1922, in the British House of Commons, that the Law Advisers of his Government, as well as the Law Advisers of

6 Constitution of the Irish Free State (Saorstát Eireann) Act, 1922 [No. 1 of 1922].

7 Phelan. "The Sovereignty of the Irish Free State." *Revue des Nations,* March, 1927.

his predecessor's Government had given the most emphatic opinion "that the Constitution is in accordance with the Treaty."[8]

The Forty-Ninth Article gives then to the Oireachtas a real and effective power to determine the attitude of the Saorstát on every issue of peace and war. This power is not restricted by the authority given to the Executive Council, in cases where the Oireachtas decides in favour of remaining neutral during a war between Great Britain and another State to grant facilities which do not, in International Law, amount to a breach of neutrality, and which in accordance with this article of the Treaty the British Government may require.

The Oireachtas as the Legislative Assembly of the Nation is endowed with certain privileges devised to ensure that it shall be as unhampered as possible in in the discharge of its very important functions. The Eighteenth Article, which grants to members certain immunities from arrest, is borrowed from the British Constitution, and the Nineteenth Article, which throws around official publications of the Oireachtas and utterances made in either Dáil or Seanad Eireann the protection of absolute and unqualified privilege, is also based on one of the rules of that Constitution, though, in the opinion of Mr. J. G. Swift MacNeill,[9] it is of wider application as regards the protection it accords to the publication of utterances made in either House than the corresponding provisions in the British Constitution. The Thirteenth Article is set amidst the legislative provisions of the Constitution, though it does not prescribe anything with regard to legislative matters. It was really inserted, on the analogy of other Constitutions, with a view to setting out what is, for diplomatic purposes, the Capital of the State.

[8] *Commons Debates.* Vol. 159, p, 328.

[9] Swift MacNeill. *Studies in the Constitution of the Irish Free State,* p. 119. Dublin (1925).

II.—THE CROWN.

The Twelfth Article was the first of the "agreed articles" mentioned by Mr. Cosgrave in his speech introducing the Constitution Bill in the Constituent Assembly.[10] It has already been stated that the Draft Constitution taken to London was altered[11] in those parts dealing with the relationship of the Crown and Great Britain to the Irish Free State, so that, instead of setting out the synthetic product of the "law, practice, and constitutional usage" governing these relations the legal, and, it may be added purely theoretical, position is first stated and then qualified so as to give effect to the practice and constitutional usage. In this Article we meet this anomaly for the first time. "A Legislature is hereby created to be known as the Oireachtas. It shall consist of the King and two Houses, the Chamber of Deputies (otherwise called and herein generally referred to as 'Dáil Eireann') and the Senate (otherwise called and herein generally referred to as 'Seanad Eireann')." The King is an element of the Parliament of Great Britain and of each of the Dominions according to law. Indeed this particular element is more correctly termed the "Crown" than the "King," an expression which implies some degree of personality. The "King" or "Crown" in the Irish Constitution is in no sense a person but rather a symbol. The Thirteenth Article very clearly shows this. Were the King a person it would follow that the King would require to be in Dublin in order that the Oireachtas might function. The Crown, as well as each of the Houses, must assent to every measure before it becomes law of the land. This is its function as part of the legislature. Such is the legal position as set forth literally in the Twelfth Article. The manner of exercising this function will be studied in connection with the Executive Power, when it will be seen that, in

10 *Vide supra,* pp. 50 ff.
11 *Vide supra,* pp. 45 ff.

practice, the Crown, as part of the Oireachtas, does not perform a single act of its own initiative but acts entirely as directed by Ministers, who are spokesmen of the Dáil and strictly responsible to that House.[12] Both the Dáil and the Seanad, on the contrary, have real functions in the matter of legislation and the former in particular has very great powers.

The Crown has, however, the function of providing evidence of every Act of the Oireachtas. Two copies of every law passed by the Oireachtas are made, one in Irish and one in English, but only one of these is signed by the Governor-General. The two copies are conclusive evidence of the provisions of the law in question, save when there arises a conflict between the two copies. In such an eventuality the signed copy is authoritative. The practice, up to the present, has been to sign only the English copy.

III.—DAIL EIREANN.

It is provided by the Constitution that Dáil Eireann may not at any time be dissolved except on the advice of an Executive Council which has not ceased to retain the support of a majority in the Dáil Eireann. When neither House is actually in session, an Executive Council which has not been defeated in the Dáil, can advise a dissolution without the consent of both Houses, but, no Executive Council can cause the Oireachtas to be dissolved, without its own explicit consent, so long as both Houses happen to be actually in session. This would seem to be the effect of the Twenty-Fourth Article, which prescribes that Dáil Eireann must fix the date of re-assembly of the Oireachtas and the date of conclusion of the session of each House. The same Article provides that sessions of the Seanad can only be concluded with its own consent. Thus

[12] *Vide infra*, pp. 94 ff.

when both Houses are actually sitting a formal resolution of the Dáil is required to the effect that the session of each House shall conclude on a given date, subject to Seanad Eireann consenting accordingly, and fixing the date of the reassembly of the Oireachtas. A resolution of the Seanad is then required consenting to the conclusion of its Session on the date specified in the resolution of the Dáil.[13] Only when these formalities have been complied with can the required proclamation be issued by the Governor-General dissolving the Oireachtas.

Dáil Eireann is composed of deputies elected to represent territorial constituencies in the proportion of not more than one deputy for each Twenty Thousand of the population, nor less than one for each Thirty Thousand of the population. In addition, the University of Dublin and the National University of Ireland have each the right to elect three Deputies. In the draft constitution it was proposed to give the Universities representation in the Seanad, but this was changed to representation in the Dáil, by the Constituent Assembly. At the present time the total number of seats in the Dáil is one hundred and fifty-three, but the Constitution provides for a decennial revision of the constituencies in order to maintain the ratio prescribed, notwithstanding changes in the size and distribution of the population. All members of the Dáil are elected upon principles of Proportional Representation. The system at present prescribed, by the Electoral Law, is the single transferable vote system. Every citizen who has attained the age of twenty-one is eligible for election as a Deputy provided he is not disqualified by law. The chief classes of persons disqualified by the law are convicts, lunatics, bankrupts, persons guilty of corrupt practices at elections, members of the military and police forces on full pay, and civil servants.

[13] These formalities have been observed in the case of all dissolutions, save that of August, 1927. In that case both Houses had adjourned until October.

The Electoral (Amendment) (No. 2) Act, 1927, provided a further disqualification—viz., that no person can become a candidate for election to either House of the Oireachtas unless he swears and delivers an affidavit declaring his intention to take his seat if elected and to comply with the provisions of the Seventeenth Article.

The legislative power is, in the ultimate resort, vested in the Dáil. Neither the Seanad nor the Executive has a power of veto over legislation passed by the Dáil. As will be seen later the real executive of the country, the Executive Council, is chosen from amongst its members, assumes power with its assent and functions as the creature of its will. In particular the finances of the State are controlled and supervised by Dáil Eireann. The Dáil has, with regard to Money Bills as defined in the Thirty-Fifth Article, legislative authority exclusive of the Seanad. The Minister of Finance must be a member of Dáil Eireann, and also a member of the Executive Council. The control of all disbursements out of the Central Fund and the audit of all monies voted by the Oireachtas is entrusted to a Comptroller and Auditor-General. This officer is appointed by Dáil Eireann for life, and reports to that House alone. He can only be removed, however, by resolutions of both Houses for stated incapacity or misbehaviour.

IV.—SEANAD EIREANN.

The first Seanad Éireann was constituted in a special manner as prescribed by the Eighty-Second Article, one of the transitory provisions of the Constitution. This Article provided for one-half of the members being elected by Dáil Eireann and the other half being nominated by the President of the Executive Council, and was devised in agreement with certain representative members of the old Unionist minority. This particular machinery applied only to the creation of the first Seanad which assembled for the first time on the 11th December, 1922.

The Constitution, as passed by the Constituent Assembly, provided that ordinarily one-fourth of the members—i.e., fifteen should retire each third year, and an election be held to elect Senators to fill these fifteen vacancies, and any other vacancies that should have been caused by death, resignation, or disqualification since the previous election. A panel was formed in the following manner. Dáil Eireann voting, according to Proportional Representation, nominated twice as many qualified persons as were to be elected, and Seanad Eireann, voting on the same principle, nominated a number equal to the number to be elected. These names, with the addition of the names of any former Senators and retiring Senators, not already included therein, and who had signified their desire to be included thereon, constituted the panel. The vacancies were filled by an election, held throughout the Saorstát, an the principles of Proportional Representation, at which every citizen who had reached the age of thirty years was entitled to vote. The Thirty-First Article stipulates that a person to be eligible for election to the Seanad must be a person eligible to become a member of the Dáil, and in addition must have reached the age of thirty years.

Many members of the Unionist minority seemed to regard with no little apprehension the withdrawal of alien authority from Ireland and their being left to throw in their lot with the rest of their own countrymen With a view to dispelling these fears Arthur Griffith undertook to negotiate with certain representative men[14] amongst them, and on behalf of their countrymen who formed the majority of the Nation, to incorporate certain provisions in the Draft Constitution which the minority felt to be safeguards for themselves, and to recommend their acceptance to the Constituent Assembly. Proportional Representation was incorporated in the Draft Constitution, as

[14] The persons who represented this minority were, Most Rev. Dr. Bernard (then Provost of T.C.D.); Lord Donoughmore, Lord Midleton, and Mr. Andrew Jameson.

originally prepared, with a view to safeguarding minorities. Later it was agreed that the Senate should consist of 60 members. The method of forming the panel described above, the age of Seanad Voters, the minimum age required for election as Senator, the term of Office of Senators, as well as the provision that the constituency for the election of Senators should be the Saorstát taken as a whole were amongst the safeguards agreed upon with representatives of this minority.

It was hoped by some members of the Constituent Assembly that this last provision, by removing the local appeal and creating associations that would not be regional, would create a Seanad representative of functional and occupational interests in contradistinction to the Dáil, representative of geographical areas; and further that only citizens of outstanding merit would be able to secure election by a nation-wide constituency. The first general election of Senators held since the constitution of the first Seanad, that which took place in 1925 scarcely justified these hopes. The mode of election proved very unwieldy in practice. Most of the candidates while well known in certain localities, were almost entirely unknown in others. The voters appeared to be bewildered once they voted for the few candidates known to them, and the moral which the election seemed to point was that this machinery gives the wealthy candidate, or the candidate with an organisation or party machine behind him an immense advantage over any candidate however great his services to the Nation, who lacks such organised support.

It is probable that the Constituent Assembly would, in any event, have adopted a bicameral legislature, but the Seanad as it is actually constituted was designed with the special object of securing representation in the legislature for minority interests not likely to secure adequate representation in an Assembly elected on such a basis as that on which the Dáil is elected. It is as yet too soon to say how far this

intention will be fulfilled. A number of Constitutional amendments, to which reference is made in a later chapter, have entirely changed the method of forming the panel and the mode of election just described. The first and second Seanad Eireann have, however, justified the hopes of the Constitution makers that this Chamber would prove useful in fusing together, in a common enterprise, schools of political thought that were formerly hostile to one another and in enabling the old Unionist minority to participate with the majority, with which they were formerly in political disagreement, in transacting the business of the country.

A second object in creating the Seanad was to provide what has been aptly termed a legislative "cooling chamber." This function it has, on the whole, admirably discharged. If any reproach can be addressed to the Seanad, it would be on the score of its being too subservient to the Dáil. It has never taken up an attitude of obstruction of or hostility to the Will of the People, clearly expressed through the Dáil, on matters of grave national importance. Representative, as it was, of what had been a political ascendancy under an order of things, uprooted and swept away by the flood of a National Revolution; and coming into existence, as it did, in the midst of Civil War, the Seanad was, at first, somewhat timid in the manner of exercising its rights. It has shown, under more peaceful conditions and dealing with a Dáil less entirely composed of the revolutionary majority, a consistent tendency to exercise its rights and discharge its functions as a cooling chamber with respect to ordinary legislation passed by the Dáil.

The powers of the Seanad are, at the same time, markedly less than those possessed by the Dáil. With regard to the subject matter of Money Bills, as defined by the Thirty-Fifth Article, the Seanad has no powers whatever except that it is given a maximum period of twenty-one days in which to submit recommendations to the Dáil. The Dáil is, however, perfectly free to reject all or any of these recommen-

dations, and the Bill as passed by the Dáil is deemed to have been passed by both Houses, and likewise if the Seanad takes no action within that period the Bill is deemed to be passed by both Houses. An ordinary Bill passed by either House and accepted, without alteration, by the other House is deemed to have been passed by both. Any Bill, other than a Money Bill, may be initiated in Seanad Eireann and if passed by that House it is sent to Dáil Eireann. If the Dáil amends it in any way the amended Bill is treated as a Bill initiated in Dáil Eireann.

The greatest of the powers bestowed upon the Seanad by the original Constitution was that of compelling the submission of any Bill, except Money Bills, or Bills declared by both Houses—and therefore by the Seanad itself—to be necessary for the immediate preservation of the public peace, health or safety, to a Referendum. This power was taken away from the Seanad by the Sixth Amendment, and in compensation for this the Seanad was given, by the same Amendment, greatly extended power of suspending Bills, other than Money Bills, passed by the Dáil. The Seanad may now amend any such Bill as it chooses, contrary to the wishes of the Dáil, or reject it *in toto* or decline to take any action with regard to it. The Bill is thereupon suspended for a "stated" period. The "stated" period is normally eighteen months from the day on which the Bill is sent to Seanad Eireann by the Dáil unless a dissolution intervenes, in which case the "stated" period ends upon the date of the reassembly of the Oireachtas. For one year after the end of the "stated" period, Dáil Eireann may, by resolution, send the Bill once more to Seanad Eireann either in the same form as on the first occasion or with modifications embodying amendments suggested by the Seanad or required as result the lapse of time. The Seanad has a period of sixty days within which to pass the Bill so returned with or without amendments. At the expiration of the sixty days, the Bill, if the Dáil so resolves, becomes law in the form in which it was last sent to the

Seanad with such modifications proposed by the Seanad as the Dáil sees fit to accept.

The Seanad bears no comparison to the Senate of the United States as regards functions or the power it wields as compared with the other Chamber. It is immeasurably weaker than the American Senate. and has no function akin to the control of patronage and of foreign affairs to which the United States Senate owes so much of its strength and power *vis-à-vis* the House of Representatives. Its legislative powers resemble closely those possessed by the House of Lords since the passing of the Parliament Act, 1911.[15]

V.—THE REFERENDUM.

The right of the People to refuse or accept a proposed law submitted to them is generally known as the Referendum, a name drawn, according to Lord Bryce,[16] from the usage in the old Swiss Confederation by which delegates to the Diet from a Canton were entitled to withhold their assent to a resolution of that Body till they had referred it to their own Canton for approval or rejection. The Referendum on ordinary legislation which was provided in the Irish Constitution when adopted was deleted by the Sixth Amendment, passed in 1928.

By the Referendum, power is given to the People, that is to say, the "qualified citizens," to express their opinion on a measure which has passed through the Legislative Assembly, and to say whether or not it is to become law of the land. A day is appointed by Proclamation on which the Referendum is to be taken. The Referendum is conducted by a poll being taken in the constituencies on that day, and in the same manner as an election, on the single question of the Bill to which the Referendum relates, and the

[15] 1 and 2 Geo. V, ch. 13.
[16] Bryce. *Modern Democracies*. Vol. 1, p. 417. London (1923).

result of the Referendum is ascertained by tabulating the results from all the constituencies. It is one form of Direct Legislation by the People, an institution until recent times almost peculiar to Switzerland amongst modern states, but incorporated in an increasing number of other constitutions, especially those of the post-war period, amongst others, the recent German,[17] Austrian,[18] and Czechoslovak[19] Constitutions. Australia is the only other member of the British Commonwealth which makes provision in its Constitution for Direct Popular Legislation.[20] The Referendum as applied to cantonal affairs in Switzerland varies according to the Canton. The Federal Constitution provides[21] for a Referendum on all Federal laws and *arrêts*, other than those declared by the Legislature to be urgent where a demand is made, either by 30,000 citizens or by eight cantons during the ninety days which elapse before a law comes into effect.

While strong cases can be made in theory against, as well as in favour of, the Referendum, it is generally agreed that, in Switzerland, it has worked in a manner which has justified its continued existence, and that it has there become a permanent institution both in the Confederation and in the Cantons. Experience has proved that it is not used in an abusive manner. This at least was also true of the Referendum in Ireland.

The Referendum on ordinary legislation provided in the Irish Constitution, as passed in 1922, was a Qualified Optional Referendum. There was no class of ordinary legislation which had to be submitted to the People of necessity and without a demand for a Referendum being made, but it was open to either one-twentieth of the voters on the register of voters or three-fifths of the members of Seanad Eireann to

17 Articles 18, 73, 74, 75, 76, 167.
18 Articles 43, 44, 45, 46, 48.
19 Article 46.
20 63 & 64 Vic., ch. 12, sec. 128.
21 Articles 89, 90, 120, 121, 122, 123.

compel any Bill, save one declared to be urgent by both the Dáil and the Seanad, to be submitted to a Referendum. This Optional Referendum was qualified by the condition that, in the first instance, before the option could be exercised by either the People or the Seanad, the Bill in question should be suspended by a properly formulated demand, made by a prescribed number of Deputies or Senators.

The reasons which moved the Constituent Assembly to include the Referendum amongst the provisions of the Constitution were chiefly two in number. Firstly, the desirability of impressing on the people that henceforth under the new Constitution the law would be their law. As Mr. Kevin O'Higgins put it, in moving the adoption of the Forty-Seventh Article "personal, actual contact between the people and the laws by which they are governed is advisable in a country which is passing out of a condition of bondage and a country where the traditional attitude of the people is to be against the law and against the Government. The Referendum, we consider, will be a stimulus to the political thought and the political education of the People."[22] A second reason was the desire to have a check upon the legislature—in reality the Dáil—in cases where it might cease to be representative of the will of the People, or misinterpret it in a particular instance.

VI.—THE INITIATIVE.

Mr. Swift MacNeill in his work on the Constitution, in the part dealing with the Forty-Eighth Article, now deleted, speaks of "the powers of initiation by the people of proposals for laws or constitutional amendments conferred under this Article."[23] It is an error commonly made to state that the Initiative formed a part of the constitutional machinery of Saorstát

[22] *Dáil Debates* (Sept. to Dec., 1922), p. 1211.
[23] Swift MacNeill. *Studies in the Constitution of the Irish Free State*. p. 179. Dublin (1925),

Eireann. This is not so. The Constitution, by this Article which was purely permissive, gave to the Oireachtas the power to make provision for this second type of Direct Popular Legislation which is also a feature of the Swiss Constitutions, and provided that if and when the Oireachtas did so it should include three provisions which the Article enumerated.

The Initiative resembles the Referendum in one respect—namely, that it is a form of Direct Popular Legislation, but otherwise the two things are very different. The Initiative gives power to the People to submit to the Legislature proposals for laws or for constitutional amendments. The details governing the exercise of the Initiative vary in different states, but speaking generally it may be said to be of very doubtful value. Experience of its working in various countries has shown that its advantages outweigh its disadvantages only when it is limited in its application to matters which concern the great bulk of the people, and of which they have a fair understanding and where it is exercised by an electorate, animated by a keen civic spirit, and endowed with more than average intelligence. The arguments in favour of the Initiative are less telling than those in favour of the Referendum. This fact was realised by the framers of the Irish Constitution, and accordingly they left the question of the Initiative to be decided at a later date.

The intention of the Constituent Assembly undoubtedly was that after two years had elapsed 75,000 voters could petition the Oireachtas to pass legislation introducing the Initiative or submit the whole question to a Referendum. The Oireachtas did not make provision for the Initiative up to the time this Article was deleted by the Sixth Amendment. Further the Forty-Eighth Article, in so far as it was intended to ensure that the Oireachtas might, after a given period, be compelled to institute the Initiative was defectively drafted. It did not state to whom the petition was to be delivered nor place a limit to the time within which the Oireachtas should make

such provisions, assuming that a petition were presented, and consequently when a petition was duly drawn up in accordance with this Article and leave was sought to present it to Dáil Eireann, as a first stage in presenting it to the Oireachtas, the Dáil which contained a majority resolutely opposed to the Initiative simply passed a resolution deferring consideration of the question until the Oireachtas should have prescribed the procedure to be adopted for the presentation of petitions contemplated by this Article. Before ever this had been done the Oireachtas passed the Sixth Amendment deleting this Article.

CHAPTER V.

THE EXECUTIVE POWER.

I.—THE CROWN.

THE Fifty-First Article presents an anomaly similar to that which has been remarked in the case of the Twelfth Article. It first declares the Executive Authority of Saorstát Eireann to be vested in the King. This is the strict legal or theoretical position of the Crown in Canada, by virtue of the British North America Act, 1867.[1] The Article thereupon qualifies this declaration by the clause " and shall be exercisable, in accordance with the law, practice, and constitutional usage governing the exercise of the Executive Authority, in the case of the Dominion of Canada, by the representative of the Crown."

What then is the actual position in Canada of the Crown or its representative as Executive Authority? The most authoritative statement on this matter is undoubtedly that contained in the Report of the Inter-Imperial Relations Committee[2] of the Imperial Conference, 1926, unanimously adopted by the Conference on the 19th November of that year. " In our opinion it is an essential consequence of the equality of status existing among the members of the British Common-

[1] 30 Vic., ch. 3, sec. 9.

[2] This was a Committee of Prime Ministers and Heads of Delegations of which Lord Balfour was chairman. The members of the Committee included the Prime Ministers of Canada, Australia, New Zealand, South Africa, the British Secretaries of State for Foreign Affairs and for Dominion Affairs, and the Vice-President of the Executive Council of Saorstát Eireann, the late Mr. Kevin O'Higgins.

wealth of Nations," says this report,[3] "that the Governor-General of a Dominion is the representative of the Crown holding, in all essential respects, the same position in relation to the administration of public affairs in the Dominion as is held by H.M. the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government." And again,[4] ". . . . it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion." Thus it was clearly the view of this Committee that the Crown, or its representative in Canada, occupies the same relative position in that country as it does in Great Britain, in other words the Governor-General of Canada functions as a Constitutional Monarch. "The Crown in Australia or Canada," says Sir Sidney Low, "is the sovereign acting through and by the group of statesmen chosen by the Australian and Canadian electorates."[5] The Crown in Great Britain performs its Executive functions entirely in accordance with the advice tendered to it by the Ministers who form the British Cabinet for the time being.

The Constituent Assembly would have preferred to omit the Crown from this particular Article, and there is reason to believe that this was done in the draft taken to London, but throughout the British Commonwealth executive authority is vested nominally in the Head of the Commonwealth, and in consequence of the view of Article 2 of the Treaty which finally prevailed, it was necessary to set out a similar provision in the Irish Constitution. The function of the Crown, as Head of the Commonwealth, is to act as the link

[3] Imperial Conference, 1926. *Summary of Proceedings*. p. 16. London.

[4] Ibid, p. 17.

[5] *Vide* Article by Sir Sidney Low in the *Sunday Times*, London, 28th Nov., 1926.

connecting the members of the Commonwealth with each other and as the emblem or sign of that Association. As nominal head of each of the component parts its function is, as has been very aptly said, that of a Constitutional "rubber stamp." The hand that wields the stamp in the Saorstát is the Executive Council.

The Governor-General of the Irish Free State is the personal representative of the Crown in the Saorstát. He is appointed by the King as his personal representative, but must be a *persona grata* with the Executive Council, which has to be consulted before the appointment is made. He acts in precisely the same manner as the President of an Irish Republic would act, under a similar type of Constitution, save that certain of his public acts are expressed as being done in the name of the King. In the Dominions the Governor-General is usually an Englishman, nearly always the bearer of a title of nobility, who has distinguished himself in the service of the Imperial Government, and not a native of the Dominion. In the Saorstát a noteworthy precedent was created by the appointment, as first Governor-General, of a native born Irishman, a citizen of the Saorstát, and a "commoner."[6] This precedent was deliberately set by the first Executive Council and, harmonising so obviously as it does with the spirit of the Constitution, it is extremely likely that it will be followed in the case of all future appointments to that office, as has already been done in the case of the second Governor-General.[7]

The Constitution does not define explicitly the period of office of the Governor-General, but on the analogy of Canada it will probably be in practice six years. The first Governor-General held office for a few months longer than this period owing to certain exceptional circumstances. The proviso in the Sixtieth Article that his "salary shall be of like amount as that now payable to the Governor-General of the Commonwealth

[6] Mr. Timothy Michael Healy.
[7] Mr. James MacNeill.

of Australia," was inserted with the consent of the British Government, and fixes the salary of the Irish Governor-General at £10,000 per annum.

II.—THE EXECUTIVE COUNCIL.

In reality the Executive Authority of the Irish Free State is vested in a Council of Ministers, styled the Executive Council. It has already been mentioned that the provisions of the Draft Constitution dealing with the composition of the Executive Council met with much opposition in the Constituent Assembly and that the scheme embodied in the draft was radically changed.[8] Exception was taken chiefly to the fact that ordinarily only four members of that Council would be members of Dáil Eireann, while double that number, two-thirds of the Body in which the real Executive Authority of the State would be vested, would be men who for one reason or another had not faced the electorate. The fact that the scheme amounted to creating a cabinet within a cabinet was objected to. The fact that the scheme limited the principle of collective responsibility was also criticised as was the provision which made the bulk of the Council not removable in the same manner as Ministers in countries where the Parliamentary system obtains.

The Ministry endeavoured to justify the scheme in the Constituent Assembly on the grounds that it would be more suited to the system of political groups which was likely to grow up under Proportional Representation in succession to the Party system, than an Executive Body collectively responsible to the Legislature which was suited to the Party system such as exists in England. It was modelled on the Swiss system, a system which had worked admirably in that country where conditions were in many ways analogous to those prevailing in Ireland. The scheme, it was argued, would make it possible to select Ministers

[8] *Vide supra,* pp. 47 ff.

from the body of the Nation, solely on the basis of their particular fitness for office, and not because of political or party services. Further it would enable a Minister to bring forward proposals and have them discussed, and even rejected, by the Dáil without thereby endangering the whole Ministry.

The Constituent Assembly felt that the scheme in the Draft was unacceptable as it stood, and adopted on 6th October, 1922, a resolution in the following terms: "That this House approves as a general principle that certain Ministers, who shall not be members of the Executive Council, nominated by the Dáil and individually responsible to the Dáil alone for the departments respectively under their charge need not be members of the Dáil . . . ." and instructed the Ministry to appoint a committee to arrange details of the provisions regarding the appointment of these Ministers. This was the origin of the very much discussed "extern" Ministers. The Committee appointed recommended nine new clauses in place of nine Articles of the Draft Constitution,[9] and the new articles recommended were subsequently adopted in substance by the Constituent Assembly.

The resolution appointing the Committee, by implication, adopted the principle known as the Parliamentary System, instead of the variation of what Lord Bryce terms the Swiss System, which was provided in the Draft. The Executive Articles as finally passed by the Constituent Assembly, created an Executive Council of not less than five Ministers, every member of which must be a member of Dáil Eireann. The Minister for Finance must be a member of the Executive Council, as must also the particular Ministers who are appointed to be President and Vice-President of the Council, but otherwise the Constitution does not prescribe that any particular Minister shall be a member of the Executive Council.

The President of the Executive Council is appointed on the nomination of Dáil Eireann. The Governor-General must appoint the person nominated by the

[9] Articles 50, 51, 52, 53, 54, 55, 56, 57 and 59 of the draft.

Dáil. The President, as soon as he is appointed submits to Dáil Eireann the names of the persons he wishes to nominate as Vice-President, as Minister of Finance and as other members of the Executive Council. All must be members of Dáil Eireann[10] Since the Executive Council acts as a collective body the Dáil votes on the President's nominees as a "bloc" and not individually. It rejects or approves all. If the Dáil approves of his nominations, he formally submits them to the Governor-General who must thereupon appoint the persons so nominated to be members of the Executive Council. The Ministers, thus appointed on the nomination of the President, constitute together with the President, the Executive Council of Saorstát Eireann.

The Executive Council acts as a collective body and is collectively responsible for all matters of State administered by the departments of which its members are the heads, as well as for the preparation of the Estimates and their presentation to the Dáil. It is made responsible to the Dáil alone, not to the Oireachtas as a whole, by the provision in the Fifty-Third Article that its members must retire from office should it cease to retain a majority in the Dáil, though they are bound to continue to discharge their functions until their successors replace them.

The Council is responsible for the direction of state policy in all bigger issues of politics, domestic and foreign and for administering the financial affairs of the State. In all cases, save one,[11] where the formal intervention of the Crown in such matters is prescribed by the Constitution, the Crown or its representative acts solely on the advice of the Executive Council. The Crown cannot decline to accept the advice offered by the Executive Council except that by the Fifty-Third Article it is provided that "... the Oireachtas shall

[10] A Constitutional Amendment has already been introduced, but not yet passed, which proposes to make members of the Seanad eligible to become members of the Executive Council.

[11] *Vide post*, pp. 118 ff.

not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann." This proviso ensures that the Dáil shall always remain the master of the Executive, unlike the British House of Commons which, though it is the master of the Government in Great Britain, in as much as that the Cabinet is really appointed by the House and can be forced out of office at any time by a vote of no confidence, the House must itself be dissolved by the Crown if its dissolution is advised by the Prime Minister, even after he has ceased to retain the confidence of the House.

In addition to the matters, for the direction of which, as has been mentioned, the Executive Council is made generally responsible, there are several matters specifically confided to that Body by the Constitution. The first of these matters is the bestowing of Titles of Honour which, as was mentioned earlier, cannot be conferred except upon the advice of the Executive Council. The purpose of this Article, the Fifth, has been explained in a preceding chapter.[12] That the end aimed at has been, in great part, achieved may be realised from the fact that no title of honour in respect of services to the Saorstát has been conferred on any Irish citizen since the establishment of the Saorstát. It should be mentioned at the same time, that the Crown, acting presumably on the advice of the British Government, has conferred titles on Irish citizens in respect of services rendered prior to its establishment.

The Thirty-Seventh Article provides that no money may be voted by the Dáil nor any taxes imposed or augmented except at the instance of the Executive Council. This article embodies a most salutary provision of the British Constitution, which was adopted in order to ensure that the Executive which is really responsible for the administration of all the great services and charged with the management of the finances of the State, and which by reason of the nature of its functions is in a position

[12] *Vide supra,* p. 60.

to know better than any other body the requirements of the State, should alone have the right to initiate Money Bills. It has been the experience, where no similar rule prevents private members from asking the Legislature to vote monies, that private members tend to seek to have money voted in the interests of their Constituencies without considering the larger interests of the Nation as a whole.

The nomination of all Judges is a matter also specifically entrusted to the Executive Council by the Constitution, but the appointments are made nominally by the Governor-General.

Another function of the Executive Council is to present Bills passed by both Houses to the Governor-General for signification by him of the assent of the Crown, as a part of the Oireachtas. The assent of the Crown is signified by the Governor-General without reference to the King in England on advice tendered by the Executive Council. The Crown, which is the titular head of all and each of the "Sovereign Nation-States," as Sir Sidney Low calls them, which form the British Commonwealth, can in the Saorstát *qua* Executive or Legislator act only on the advice of the Executive Council of Saorstát Eireann. In view of the fact that the Executive Council must, in order to function, have the support of a majority of Dáil Eireann there is little likelihood of its tendering advice to the Crown not to assent to a Bill deemed to be passed by both Houses. The veto is as dead in Saorstát Eireann as in Great Britain. No Bill passed by the two Houses of the Oireachtas has ever been vetoed by the Crown. The Forty-First Article which deals with this matter was one of the "agreed" articles previously mentioned,[13] and like most of these it sets out firstly the strict law as it exists in theory in Canada. Canadian legislation was formerly reserved, in some cases, for the signification of the King's Pleasure, which was signified on advice tendered by the British Government. This power of reservation has been little used in recent practice, but

[13] *Vide supra*, pp. 50 ff.

still existed in legal theory at the time the Irish Constitution was being framed, and accordingly we find, in the Forty-First Article, reference to the reservation of Irish Bills for the signification of the King's pleasure, and to the effect of such reservation, these clauses being governed by the proviso "that the Representative of the Crown shall in the . . . . reservation of any Bill, act in accordance with the law, practice and constitutional usage governing the like . . . . reservation in the Dominion of Canada."

In this case the proviso entirely destroys the power in question and in effect leaves the Representative of the Crown in the Saorstát without any power to reserve Bills. Whatever the position may have been originally, or even in the recent past, the Governor-General of Canada no longer possesses any power to reserve Bills for the signification of the King's pleasure. This practice meant in effect that, in certain circumstances and upon certain occasions, the Crown in Canada acted upon advice, tendered by British Ministers. British Ministers no longer have the right to advise the Crown with regard to matters exclusively Canadian. The Imperial Conference of 1926 has established this beyond doubt. In Saorstát Eireann the Governor-General has never attempted to exercise any such power, not even in the case of a Bill[14] passed with the avowed object of coercing the Crown to give a particular judicial decision which was desired by the Irish Government.

Legislation under the Constitution has vested many other important powers in the Executive Council. It is the real Executive Authority of the Saorstát. Its authority even extends to the appointment of the Governor-General, in so far as the Crown may not appoint as its representative in Saorstát Eireann any person whose nomination the Executive Council has not expressly assented to and advised. It is Commander-in-Chief of all the Armed Forces of the State, and Officers of the Army hold their Commissions during its pleasure. All Executive acts of State which

[14] *Vide post*, p. 122.

the Constitution does not expressly require to be performed nominally by the Crown are done, nominally as well as in fact, by the Executive Council.

Proclamations by the Governor-General in the name of the Crown calling together the Oireachtas always contain a statement that they are issued "by and with the advice of the Executive Council," and all are countersigned personally by the President.

III.—EXTERN MINISTERS.

The Fifty-Fifth Article makes provision for what have come to be known as "Extern" Ministers by the words "Ministers who shall not be members of the Executive Council may be appointed by the Crown and shall comply with the provisions of Article 17 of this Constitution." This is a survival of the Swiss system proposed in the draft.

The Constituent Assembly was undoubtedly impressed by certain arguments put forward in support of the original scheme. It realised that the scheme would permit of the services of a citizen who excelled in some particular capacity, but who by that very fact had not the time or inclination to enter the Political Arena, as a party politician, being availed of in a ministerial capacity. Thus it might happen that a very great educationalist or artist would be willing to give his services to the State as Minister of Education or Fine Arts provided he had not to forsake his speciality for party politics. It was also evident that for many years to come Ireland would continue to pass through an experimental stage, and that a Minister who would be free to bring measures to the Dáil for discussion and deliberation without being obliged to go out of office on an adverse vote, or without requiring the assent of all his colleagues, would be much more likely to adopt a bold policy suited to that particular stage of the country's political growth, than a Minister fettered by all the bonds that bind a Parliamentary "Cabinet" to the Legislature.

Thus we find a curious blend of the Parliamentary and Swiss systems in the Irish Constitution. The real Executive Power of the State is in the hands of an Executive Council which is more subject to the Dáil's will than any British Cabinet is to the House of Commons. But the Constitution provides for other Ministers, whom the Dáil chooses and supervises, directly and individually, as in Switzerland the National Assembly chooses and supervises the Federal Council.

The minimum number of Ministers in the Executive Council, including the President, is six. The Dáil may nominate, once the membership of the Executive Council has been determined, a number of Extern Ministers. The procedure adopted is that the President, after the Executive Council has received the approval of the Dáil and has been appointed accordingly, submits to the Dáil, if he desires to have extern Ministers in the Government, a list of Ministries the heads of which shall not be members of the Executive Council.

A committee is thereupon chosen by the Dáil, voting on principles of Proportional Representation, to make recommendations as to the persons to be nominated to these Ministries. This Committee is perfectly free to choose names from the general body of citizens or from among members of the Seanad. The Constitution places no restrictions whatever on its choice, though every Extern Minister appointed so far has been a member of the Dáil at the time of his appointment. The Dáil may accept the recommendations of the Committee and nominate the persons chosen, in which case the Governor-General must appoint them accordingly. If the Dáil reject a recommendation of the Committee, the Committee continues to recommend names until one is found acceptable, but no name can be placed before the Dáil unless it comes from the Committee.

Every Minister is given by the Fifty-Seventh Article the right to attend and be heard in Seanad Eireann, but by a strange oversight Ministers, as such, are

not given any right to attend or be heard in Dáil Eireann. However, as every Minister appointed so far was, at the same time, a member of the Dáil no difficulty has arisen in practice.

Each of the Extern Ministers must be the responsible head of at least one Department of Government.[15] The term of office of these Ministers is the term of the Dáil existing at the time their appointments are made, though like their colleagues in the Executive Council they continue in office until their successors assume office. They are responsible individually to the Dáil for the discharge of their functions. Thus their continuance in office is not affected by the defeat of the Executive Council. Likewise, the removal of an Extern Minister does not involve *ipso facto* the defeat of the Executive Council. Even the Dáil cannot remove an Extern Minister from office except for stated reasons and until the proposal to remove him has been submitted to a committee chosen in a manner to make it representative of all parties in the Dáil and that Committee has furnished a report on the proposal. This requirement ensures that Extern Ministers cannot be removed from office by a snatch vote. It makes the removal of these Ministers a matter of deliberate choice, and gives time for calm deliberation. It does not, however, prevent the Dáil, after the Committee has furnished its report, from acting contrary to recommendations of the Committee.

The Fifty-Sixth Article contains the proviso "that should arrangements for Functional or Vocational Councils be made by the Oireachtas these Ministers or any of them may, should the Oireachtas so decide, be members of and be recommended to Dáil Eireann by such Councils." The establishment of Functional Councils is not made mandatory on the Oireachtas by this clause. No arrangements have

[15] In the first Government constituted in December, 1922, after the coming into operation of the Constitution there were three "Extern" Ministers. In the second Government there were four, and in the third and fourth Governments, formed in June and October, 1927, there were no "Extern" Ministers.

been so far made nor does there appear at present to be a desire on the part of any important section of the Electorate that arrangements should be made. In these circumstances the question of such Councils having the right of recommending Extern Ministers to the Dáil has never arisen.

The Extern Minister System cannot be said to have worked, in practice, as it was hoped it would by its advocates. Mr. Kevin O'Higgins, who had been the chief advocate, in the Constituent Assembly, of the original draft scheme, speaking in Seanad Eireann on the 21st April, 1927, said, "I have stated frankly that we do not think as much of the Extern Minister's idea as some of us did in 1922, when it was embodied in the Constitution."[16] It was frankly an experiment, but experience gained so far seems to indicate that it cannot become a reality because of financial factors, and, though it still exists, an amendment[17] passed in 1927, modified the Provisions of the Constitution with respect to these Ministers by allowing the President, if he so desire, to make the full number of Ministers allowed by the Constitution members of the Executive Council instead of limiting the number to eight—the President and seven other Ministers.

The Extern Minister System is useful to have in reserve in order to allow of a citizen specially qualified in some manner to be a member of the Government for dealing with a special matter in exceptional circumstances, but it cannot be said to possess any advantages in ordinary circumstances. In all circumstances the Executive Council wields the real executive authority in the Saorstát. It is extremely probable that future Governments will consist, save in exceptional circumstances, solely of Ministers who are members of the Executive Council and that the Parliamentary System will become, for all practical purposes, the ordinary Executive system of Saorstát Eireann.

16 *Seanad Debates.* Vol. VIII, p. 884.
17 Constitution (Amendment No. 5) Act, 1927. No. 13 of 1927.

CHAPTER VI.

THE JUDICIAL POWER.

THE design of the Executive machinery of Saorstát Eireann has undoubtedly been influenced by the British or Parliamentary System of Government. The Executive Council bears many striking resemblances to the British Cabinet of the present day both in the manner in which it is constituted, and in the functions it has to discharge. Likewise one can scarcely fail to be impressed with the influence which the Constitution of the United States has exercised upon the mould of the Judicial Power in the Irish Constitution.

I.—THE SUPREME COURT AND THE HIGH COURT.

The Judicial power of the Saorstát is exercised by Judges in public Courts, some of which are the direct creations of the Constitution itself.

The Judicial Power is exercised in the decision of cases, the Legislative Power in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in the cases. The Constitution declares that these Courts shall comprise a court of Final Appeal, called the Supreme Court, and a High Court together with other Courts of First Instance having local and limited jurisdiction. Thus we note that, like the Federal Supreme Court of the United States, the Supreme Court of Saorstát

Eireann is created directly in the same way as the Legislative and Executive Organs by the Constitution. Neither the Supreme Court nor the High Court derive their being or their jurisdiction from the Executive or from the Oireachtas. But, going farther than the American Constitution, the Irish Constitution has created and defined the powers, not only of the Supreme Court but also of the High Court. The High Court is given, by the Sixty-Fourth Article, full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal. The Supreme Court, by the Sixty-Sixth Article, is given appellate jurisdiction from all decisions of the High Court, save such as may properly be excepted by law. The Constitution by these provisions places these Courts on a footing of Equality with the Executive and Legislative Powers in the State. It ensures their existence and safeguards their jurisdiction, though it leaves the question of the numbers of judges, and the organization of and distribution of business amongst the different Courts and Judges to be determined by the Oireachtas.

The jurisdiction of the Circuit Court and of the District Court and the appellate jurisdiction of the High Court are wholly within the control of the Oireachtas depending as they do upon statutory grant.

II.—THE JUDGES.

The Constitution does not confine itself to placing the Supreme Court and the High Court on a footing of equality with the Executive and Legislative Powers. It secures, as far as possible, that the Judges of these two Courts shall be in a position to exercise their functions without fear, favour or affection. It provides that their remuneration may not be diminished during their continuance in office, and that they may not be removed from office except for two reasons—namely, misbehaviour and incapacity, and even in these two cases, it provides by the Sixty-Eighth Article, that

their removal can only be effected by both the Dáil and the Seanad passing resolutions to that effect. No Judge of any Court may hold any other office or position of emolument or be a member of either House of the Oireachtas. This last provision is designed to secure that the judges shall, as far as possible, be kept outside any "entangling influences" political or financial, which might tend to interfere with the impartial administration of justice.

The greatest threat to the impartiality and independence of the Judiciary comes, in most countries, from the Executive. There is always the danger that the Executive which is concerned mainly with problems of the present, may, in cases of difficulty, be tempted to regard the decisions of judges as obstructive. It is often expedient not to observe with too much fidelity the law of the land; and the temptation to interfere with the Judiciary in order to permit of the law being flouted with impunity, as expediency suggests, is sometimes strong. Indeed one of the preoccupations of the Constitution makers of all periods has been to place the Judiciary beyond the power of the Political Executive of the day, and the efficiency of the Judicial System is a very true test of the worth of a constitution.

Three modes of choosing judges are found in modern states, appointment by the Executive, election by the Legislature, and election by the People. In the United States Federal Judges are appointed by the Executive, in that case the President, with the consent of the Senate. In Great Britain the Judges are appointed by the Executive, and the four Dominions, Canada, Australia, South Africa and New Zealand have adopted the same practice. This mode of selection has been adopted in the Irish Constitution. All Judges in the Saorstát are appointed by the Governor-General, acting on the advice of the Executive Council of the day. The same procedure is adopted with regard to transfers both temporary and permanent, and promotions of Judges of all Courts.

It has been objected that this appointment of Judges by an authority which is not judicial leaves the door open to appointments being made to judicial offices on political grounds. In theory at least, this is true, yet experience has shown, in other countries where this mode of selection is employed, that when a tenure which is practically for life is coupled with salary and social status sufficient to attract the highest talent, it gives more satisfactory results than either election by the Legislature or by the People.

Under the Constitution no one other than a judge, appointed in the manner described, can perform any act involving exercise of the judicial power, except members of Military Tribunals duly established by Statute; and where certain Rules of Court, made under Statutory Authority and duly approved by both Houses of the Oireachtas, were relied upon as giving authority to the Master of the High Court to discharge certain judicial functions, the Supreme Court held that any rule which purported to do so would be invalid and contrary to the Constitution.

The Courts of Justice Act, 1924,[1] by which Courts of Justice pursuant to the Constitution have been established in Saorstát Eireann gives the same tenure to Judges of the Circuit Court as the Constitution gives to Judges of the Supreme Court and of the High Court, but Judges of the District Court, which is the lowest of the Courts, can be removed from office for incapacity, infirmity or misbehaviour, provided that this is certified under the hands of the Attorney-General and of the Chief Justice. This Act also fixes the remuneration of the Judges. Though not as large as the income earned by very eminent Counsel at the Bar, the salaries[2] are sufficient in the case of both the Supreme Court and the High Court, to attract the very best talent; and even in the case of the Circuit Court the possibility of promotion to one of the

[1] No. 10 of 1924.

[2] Supreme Court Judges receive salaries varying between £3,900 and £4,000 per annum, and judges of the High Court from £2,500 to £3,000 per annum.

higher Courts and the security of tenure make the office of Judge of that Court much esteemed.

The new Courts have only been functioning since the middle of 1924, and this brief interval is too short to test the value of the new system. It is generally admitted that the law has been administered with impartiality and fairness. Until very recently the great dividing line in politics has been unfortunately the question of the Treaty and the Constitution, and the Government has naturally chosen its nominees for Judicial Offices from amongst persons who were in political agreement with it on this matter; but otherwise it has chosen its nominees without regard to their brand of political thought.

In the interval which elapsed between the coming into operation of the Constitution and the establishment of the new Judiciary the old British Courts in Ireland were, by the Seventy-Fifth Article, continued in being with the same jurisdiction as formerly.

No citizen other than a soldier serving with the colours may, save in time of war or armed rebellion, be tried except in due course of law and before the ordinary Courts of Justice, nor can he be tried on a criminal charge, other than a minor offence, without a jury. In a recent case,[2a] however, the High Court unanimously decided that the Seventy-Second Article was not intended to and did not apply to the exercise of the power of attachment by a Court. It was held that the provisions of that Article regarding the right to trial by jury, did not affect the inherent jurisdiction of the Courts to commit a person summarily for contempt of Court. The only extraordinary Courts permitted are such Military Tribunals as are established by law to deal with persons subject to military law, and even these Tribunals cannot ordinarily try such persons, for any offence cognisable by the ordinary courts, unless such offence is expressly brought within their jurisdiction by a code of laws or regulations duly sanctioned by the Oireachtas.

[2a] Attorney-General *v.* O Ceallaigh [1928 I. R.]

The liberty of the citizen is one of the most precious charges committed to the safekeeping of the State. It is especially the *raison d'être* of a written constitution to stand between the individual citizen and any threat to his freedom and his legal rights. One can scarcely conceive a more solemn duty if it be not the duty which is imposed on every state to preserve its own existence. The National Freedom and the Liberty of the Citizen are each sacred in the highest degree. What then if the saving of one of them involves a loss of the other, or at least putting it in jeopardy?

Constitution makers have been unable to agree upon an answer to this question. Many constitutions give priority to individual rights and liberties. Both the Belgian and Swiss Constitutions, to name but two, do not allow any but the ordinary civil courts to have jurisdiction over ordinary citizens however much the National existence may thereby be imperilled. Many others in the face of a threat to the Nation's life itself allow even the rights and liberties of citizens to be abolished or suspended until the threat has passed. Amongst these latter may be mentioned the Constitutions of the United States,[3] of Germany,[4] of Poland,[5] and of Czechoslovakia.[6]

The Irish Constitution contemplates the jurisdiction of Military Tribunals being exercised over the civil population, but only when a state of war or armed rebellion exists, and even then only in those areas in which not all the civil courts are capable of functioning, and it expressly forbids the removal of a person from an area in which all the civil courts are capable of being held to another area in which not all of them are open, in order to bring such person under the jurisdiction of Military Tribunals. Further it must be remembered that the Courts interpret the Constitution as intending that they themselves, and not the Ex-

3 Article I., 9(2).
4 Article 106.
5 Articles 123 and 124.
6 Article 97 (5).

ecutive or the Military Authorities, shall be the sole judges as to when and where a state of war or armed rebellion exists.

III.—CONTROL OF THE CONSTITUTIONALITY OF LAWS.

The Irish Constitution, like every instrument embodying constitutional laws distinct from ordinary laws, places a restraint upon the power of the Legislative Organ especially with regard to individual liberties and rights. The supremacy of the Constitution over ordinary laws secures, in theory at least, the respect of these rights. But the problem presents itself, on every occasion that a written constitution is being framed, of maintaining in practice this superiority of the Constitution over ordinary laws. In certain countries reliance is placed upon public opinion to prevent the passing of unconstitutional laws.[7] A very different solution is that of entrusting to a certain body the power of pronouncing upon the constitutionality of acts of the legislature. Two distinct types of this control are found in written constitutions. The first type places the control in the hands of a political body, such as the "Senat Conservateur" of the two Imperial Constitutions of France. The second type, which is exemplified by the Constitution of the United States, entrusts the control to a judicial body.

The right of the American Judges to control the Constitutionality of ordinary laws is nowhere expressly mentioned in the Federal Constitution of 1787. On three different occasions during the debates at Philadelphia, it was sought to incorporate a clause giving power to the Courts to declare null and void every law contrary to the Constitution and its principles but each time the proposal was rejected. No text of the American Constitution explicitly gives this power to the Judiciary, but it was deduced from the principle of the separation of the powers which forms

[7] This is the only check upon the passing of unconstitutional legislation which exists in France to-day.

the basis of that instrument. In 1803, in the case of Marbury *v.* Madison,[8] Chief Justice Marshall delivered his famous judgment which founded the doctrine of the unconstitutionality of laws, although it was, in reality, only an embodiment of the ideas which Hamilton had put forward in the "Federalist"[9] a few years earlier. Since that time American Judges have exercised the power of deciding whether or not laws of the different States and acts of the Congress are in conformity with the Constitution.

A more modern form of this control of constitutionality is the politico-judicial control found in the new Austrian[10] and Czecho-Slovak[11] Constitutions, each of which provides for a special Constitutional Court to give judgment in all questions involving constitutionality of laws.

The Irish Constitution entrusts the Control of the constitutionality of laws to ordinary judges like the American Constitution, but it does so by an express provision. The Sixty-Fifth Article reads as follows: "The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction." The Sixty-Sixth Article provides that in all cases which involve questions as to the constitutionality of any law, the Supreme Court shall have appellate jurisdiction from the decisions of the High Court.

The first case involving the constitutionality of a law, decided under the Irish Constitution, was that of Rex (O'Brien) *v* the Military Governor of the Military Internment Camp, North Dublin Union and the Minister of Defence.[12] On the 1st August, 1923, the late Court of Appeal which was still in being at

[8] 1 Cr. 137; 24 ed. 60.
[9] *The Federalist*, No. 78.
[10] Articles 137—148.
[11] Preliminary to the Constitutional Charter, Articles 2, 3 and 7.
[12] (1924.) 1st I. R., pp. 32 ff.

that time by virtue of the Seventy-Fifth Article, decided that a Bill[13] which had been passed by both Houses the previous day and which had received the King's assent, could not take effect until seven days had elapsed from the date on which it had been passed by both Houses. The grounds for this decision were that the Bill in question being admittedly neither a Money Bill nor a Bill which had been declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety, by virtue of the Forty-Seventh Article, then in force, two-fifths of the members of the Dáil or a majority of the Seanad had the right to demand that it be suspended for ninety days in order to permit of a demand for a Referendum being presented, if it were desired to submit it to the People. The Court held that a period of seven days was prescribed by the Constitution to permit of a written demand for the suspension of the Bill being presented to the President. To hold that the Royal assent made the Bill forthwith effective as an Act before the expiration of that period would have meant that the Crown could, in conjunction with the President, veto the right of Referendum on Bills given to the People by this Article. The Court held that such was clearly contrary to the Constitution, and declared that the Bill had no effect as a law on the day in question, and that an order made by the Minister for Defence under the Act was null and void. As a result of this decision both Houses had to pass a new Bill incorporating the first, and this new Bill[14] was declared to be necessary for the public peace and safety.

In the United States the right of deciding upon the Constitutionality of Laws belongs to all the Courts and not to the Supreme Court alone, but though this is so, the lower Courts are reluctant to pronounce upon the issue of unconstitutionality and thereby risk

[13] Public Safety (Emergency Powers) Act, 1923 [No. 28 of 1923.]

[14] Public Safety (Emergency Powers) (No. 2) Act, 1923 [No. 29 of 1923.]

a conflict with the Executive Authorities or Legislature, and so in practice the Supreme Court is often called upon to decide questions of this kind where they have not been dealt with by the lower Tribunals.

The American Judges in giving a decision on questions of constitutionality confine themselves to a declaration that a particular law is inapplicable to the case in question because it is beyond the powers of Congress. They do not annul it. Further, the American Courts will only declare upon the constitutionality of a law when the question of its validity is raised *par voie d'exception* in a particular case. So far is this rule carried that if the Judges are satisfied that a particular suit has been commenced with the sole object of securing a decision on the validity of a law, they may refuse to accept the plea of unconstitutionality raised by one of the parties.

In Austria the Constitutional Court can annul a law as being unconstitutional, but such annulment only takes effect from the day of publication of notice of the annulment unless the Court itself fixes a date for the annulment. In Czechoslovakia, on the other hand, the *arrêt* of the Constitutional Court abrogates the law, *ab initio*, and renders void all juridic acts based upon it.

Mr. Swift MacNeill took the view that the Irish Courts will invariably follow the practice of the American Courts in this matter.[15] It must be remembered however that, unlike the American Courts, the Irish Courts derive their power of controlling the constitutionality of laws from an express text of the Constitution and are accordingly in a stronger position. Since the establishment of the new Courts, in accordance with the Constitution, no case has arisen of a law being declared to be unconstitutional, but it is not unreasonable to suppose that, fortified by the express provisions of the Constitution and by the knowledge that their Jurisdiction is derived directly from the same source as that of the Executive

[15] Swift MacNeill. *Studies in the Constitution of the Irish Free State*, p. 53. Dublin (1925.)

and Legislative Organs, (the High Court and the Supreme Court may declare Acts of the Oireachtas which exceed the constitutional powers of that body null and void.) Besides in view of the terms of the Sixty-Fifth Article, there seems no reason why the Irish Courts should, like the American Courts, refuse to decide a case involving the constitutionality of a law even if it be raised in litigation which is of a political rather than a juridic nature.

One may also ask whether it should not be possible to seek from the Irish Courts the verification of the constitutionality of a law while that law is still in process of being enacted or even when it has been passed but before it comes into operation. So far no request has been addressed to the Irish Courts asking them to state their opinion on the validity of a law in this manner. In the Constitutional Convention of 1787 it was proposed to give power to the President and Congress of the United States to ask opinions of the Supreme Court, but nothing came of it. The American Courts, it is true, following a precedent created in 1793 when the Supreme Court refused the request of George Washington to express an opinion on Jay's Treaty, or to answer any of the questions propounded by the President, have consistently declined, despite even legislative enactments in certain States, to declare upon the constitutionality of laws in this manner.

This procedure which the French term "avis consultatifs" has undoubtedly certain advantages. M. Gilbert Gidel in discussing the established opposition of the American Judges to these "avis consultatifs" points to some of these advantages. "Il est evident que ce procédé des avis consultatifs aurait de grands avantages; non seulement la stabilité de la loi serait assurée mais encore, en menageant ainsi l'amour propre du Gouvernement et du Législateur on ferait cesser l'état d'antagonisme qui existe entre le législateur et le judiciaire dans un certain nombre

d'Etats Americains."[16] These "avis consultatifs" exist to-day in the case of the Permanent Court of International Justice.

IV.—THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

It has already been mentioned that the Articles dealing with the position of the Crown in the Saorstát generally set out firstly the legal and theoretical position, and then qualify this by a clause giving effect to the practice and constitutional usage of Canada. The converse of this is found in the Sixty-Sixth Article which deals with the jurisdiction of the Supreme Court. The first part of the Article sets forth, in as explicit terms as possible, that the Supreme Court shall be the final interpreter of the law in Saorstát Eireann. After declaring that ". . . . the decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever"; this Article proceeds to qualify this declaration by the words "Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

During the discussions which took place in June, 1922, between the Irish ministers and the British Government respecting the Draft Constitution the latter insisted that there should be inserted in the Constitution a clause preserving the prerogative of the Crown to grant special leave, when petitioned, to appeal to "His Majesty in Council." There existed, at that time, in each of the countries mentioned in Articles 1 and 2 of the Treaty, to whose status in the British Commonwealth that of the Saorstát was

[16] Gidel. *Cours de Droit Constitutionnel Comparé fait à la Faculté de Droit de Paris*, p. 179 (1927).

to be assimilated, a right of the Crown to allow, in certain cases when petitioned, appeals from the Supreme Tribunals of these countries to the Judicial Committee of the Privy Council in England, or, as it is termed in legal phraseology, "His Majesty in Council," or "the King in Council." The Irish representatives, despite their predelictions with regard to the matter, considered that the British representatives were within their strict rights under the Treaty in insisting upon this clause, and as a consequence the proviso now found in the Sixty-Sixth Article was inserted.

The Judicial Committee of the Privy Council is nominally a Committee of the English Privy Council giving advice to the King in a judicial spirit. In reality it is a Court selected, ad hoc, by the English Lord Chancellor who, though always an eminent lawyer, is at the same time a politician and a member of the British Government. It sits at Whitehall, in London, and consists of selected lawyers of distinction, most of them English, but assisted sometimes by persons who have held high judicial office in the Dominions. The Crown delivers the judgment itself, but always acts upon the report made by the Committee. The decision of the Committee, though framed as a report and announced as an intention to "humbly advise His Majesty as follows," is in reality a judgment.

Throughout the Dominions there has existed, for many years past, a strong feeling that, notwithstanding its utility in the past, the Judicial Committee as a Court of Appeal has now ceased to serve any useful purpose.[17] By the ignorance of the legislation of the Dominions it has shown, by its lack of knowledge of the peculiar conditions obtaining in each one of them, by its long delayed judgments it has irritated public opinion in all of them. South Africa has practically abolished the Appeal altogether. Australia, where all constitutional

[17] *Vide* Hall, *British Commonwealth of Nations*, p. 265-6. London (1920).

questions have been withdrawn from the Judicial Committee, has gone a long way to get rid of it, and Canada too, with the exception of the Province of Quebec, has, to quote Sir Robert Borden, "had just about enough of Appeal Courts."

The proviso in the Sixty-Sixth Article embodies the South African position. It allows no appeal to the Privy Council as of right. It merely gives the right to petition the Crown to exercise its discretion and to grant special leave to appeal. The practice governing the exercise of this discretion, on the advice of the Judicial Committee, varies with each Dominion. When the proviso in question was inserted, in accordance with the desires of the British Government, the Irish representatives, who were more concerned with the practice and usage which was to govern the appeal than about the actual terms of the proviso, raised the question as to what extent this prerogative was a reality. It was apparently agreed, on the grounds that the Saorstát is, in judicial matters, analogous to a unitary Dominion, like South Africa, more than it is to non-unitary Dominions like Australia and Canada, that the usage and practice in the case of South Africa would apply to the case of Saorstát Eireann.

In the Union of South Africa the cases in which leave to appeal is given are much restricted. The general sense of the country with regard to each particular case is taken into account. It was admitted by the Judicial Committee itself when refusing leave to appeal in the Whittaker case[18] that the intention of Section 106 of the South African Constitution was "to get rid of appeals to the King in Council, except such as, in the strict exercise of the prerogative, His Majesty should say that he would allow on some great ground," and that all appeals were to be looked at from a South African point of view. The general rule is that no leave is given where the question is one that can best be determined in South Africa, or if it is essentially a South African question, no matter how

18. (1921.) *L. I. R.*, p. 119.

important it may be. Leave was granted in the case of the few appeals that have been heard since the establishment of the Union, on the grounds that they involved questions which did not affect exclusively that member of the Commonwealth.

On the 25th July, 1923, three petitions for leave to appeal from decisions of the Court of Appeal in Saorstát Eireann came, for the first time, before the Judicial Committee.[19] Two out of the three petitions were dismissed, while the third was withdrawn by consent. Lord Haldane presided, and the other members of the Judicial Committee, on that occasion, were Lord Buckmaster and Lord Parmoor. In a statement dealing with the principles to be observed in the case of Irish petitions Lord Haldane stressed the analogy of the Saorstát to South Africa and the importance that was to be attached to the wishes of the Saorstát in this matter. Lord Buckmaster, in reply to a point made by counsel, stated[20] that the Irish Constitution made it quite plain that finality and supremacy were, as far as possible, to be given to the Irish Courts.

On the 7th December, 1925, three further petitions for leave to appeal came before the Judicial Committee, which consisted on this occasion, of the English Lord Chancellor, Lord Cave, who presided, Lord Dunedin and Lord Shaw. One of the petitions, the case of O'Callaghan *v.* O'Sullivan, was dismissed on grounds similar to those on which the first three petitions had been dismissed, but leave to appeal was granted in the two other cases.

Of these two cases, one Lynham *v.* Butler, concerned the interpretation of certain provisions of the Land Act passed by the Oireachtas in August, 1923.[21] The case originally came before the High Court in Dublin, and was decided in favour of the defendant. The plaintiff appealed to the Supreme Court which affirmed the decision given by the High Court. The

[19] (1926) I. R. pp. 402 ff.
[20] Ibid, p. 409.
[21] No. 42 of 1923.

plaintiff thereupon petitioned for special leave to appeal to the Judicial Committee of the Privy Council, and this leave was granted.

Public opinion in the Saorstát was almost unanimous in regarding this action of the Judicial Committee as an encroachment upon the Constitution. The question in dispute was essentially a local question involving purely domestic interests, and the Saorstát Government felt that the granting of leave to appeal in such a case, was a grave departure from the assurances given by the British Ministers in June, 1922, on the basis of which the proviso in the Sixty-Sixth Article had been written into the Constitution.

A Bill was introduced, and passed by both Houses without a division, declaring and confirming that the law on the question in dispute was as it had been found to be by the two Irish Courts. This Bill became law[22] before the case was due to come before the Judicial Committee on appeal. Mr. O'Higgins, speaking in the Dáil on 3rd February, 1926, explained its object. "In this case we have introduced a Bill," he said, "and we will invite His Majesty in one capacity to be a partner to an Act which His Majesty, in another capacity, when he comes to consider Lynham *v.* Butler will rather be a factor." It was a step designed to leave the Judicial Committee simply one course when it would come to consider that case—namely, to uphold the decision of the Supreme Court. The protest was effective in as much as the case was as a consequence withdrawn by the Appellant, and was never decided by the Judicial Committee.

The second case in which leave to appeal was given, Wigg and Cochrane *v* the Attorney-General of Saorstát Eireann arose out of Article 10 of the Treaty.[23] It raised issues that were not purely domestic issues, and the Saorstát Government felt that, as long as appeal did lie to the Judicial Committee, issues affecting the relations, *inter se*, of

[22] Land Act, 1926 [No. 11 of 1926.]
[23] *Vide* Appendix I.

members of the Commonwealth, might be properly admitted. They admitted that such issues were involved in the Wigg and Cochrane Case, and consequently no objection was raised. The case came before the Judicial Committee, and on 3rd May, 1927, the decision of the Supreme Court was reversed.[24]. This is the only case, from the Saorstát, in which the Judicial Committee has delivered a judgment.

Unfortunately for the prestige of the Privy Committee its decision in this case involved results which were never contemplated by the Irish signatories to the Treaty. After months of official silence it was announced in February, 1928, that the Executive Council did not propose to give effect to the decision of the Judicial Committee in this case. Still more significant was the announcement that the British Government concurred in the view that neither party to the Treaty intended, what the Judicial Committee had found to be the intention of Article 10, and was in agreement with the attitude of the Irish Government. Still later during a debate in the House of Lords two members of the Tribunal which had delivered this judgment admitted that the decision in this case was a mistaken one. Never was the futility of the Appeal to the Judicial Committee more clearly demonstrated.

Professor Berriedale Keith, writing of this proviso regarding appeal by special leave to the King in Council, says:—[25]"Attempts to safeguard this appeal are made but inadequately; the essential provision that decisions by the King in Council shall be binding on Irish Courts is omitted, and, as Australian precedent shows, cannot be assumed." It is by no means certain that the Irish Courts will accept decisions of the Judicial Committee as creating precedents, which they are bound to follow. They may take the view that the intervention of the King in Council reversing a decision of the Supreme Court in a particular case

[24] (1927.) *L. R.* (Appeal Cases) 674.
[25] *The Times,* 16th June, 1922.

is an act between the Crown and the Appellant, and is in no way binding on them.

The incident provoked by the case of Lynham *v.* Butler would seem to establish that any attempt by the Judicial Committee to entertain appeals from the Saorstát, otherwise than in accord with the wishes of the Saorstát, can, in the last resort, be defeated by the Oireachtas any time it wishes.

It is nevertheless humiliating and offensive to Irish National sentiment that a foreign tribunal should have an effective power, in any circumstances whatever, to decide issues involving the interpretation of the Constitution and the laws passed by the National Legislature. From a purely judicial point of view, the Judicial Committee of the Privy Council cannot be regarded as better fitted to give judgment in Irish cases than the Supreme Court, and it certainly does not possess, as a tribunal, the confidence of the great bulk of Irish citizens.

As long as the appeal to the Judicial Committee exists and to whatever extent it survives, to that extent judicial independence will be lacking in the Saorstát. It constitutes the one real diminution of National Sovereignty contained in the Constitution.[26]

V.—A SPECIAL FUNCTION OF SUPREME COURT JUDGES.

The Thirty-Fifth Article contains a provision that is unique in constitutional machinery, and confers upon the Judges of the Supreme Court a very singular power. This Article commences with a declaration that Dáil Eireann shall, in relation to Money Bills, have legislative authority exclusive of Seanad Eireann, and then proceeds to define, so far as it can be defined, what is a Money Bill. Ordinarily any Bill certified by the Chairman of Dáil Eireann to be a Money Bill is accepted as such.

[26] On the 5th Nov., 1928, two further applications for leave to appeal came before the Judicial Committee. In one case, Performing Right Society, Ltd., *v.* Bray U.D.C., leave to appeal was granted.

In particular cases doubt may arise as to the real nature of a Bill. The right is given to two-fifths of the members of either House to question whether a Bill so certified is or is not a Money Bill, within three days of its being passed by the Dáil. In such an eventuality the matter must be referred to a special Committee of Privileges whose decision is final. This Committee consists of three members elected by each House with a Chairman who, to quote the words of the Article, "shall be the senior judge of the Supreme Court able and willing to act, and who in the case of an equality of votes, but not otherwise, shall be entitled to vote." As soon as a memorial signed by the requisite number of members of one of the Houses is received by the Chairman of that House and a Message has been despatched to the other House informing them accordingly, the President of the Executive Council convenes a meeting of the Committee within seven days from the issue of the certificate of the Chairman of the Dáil that the Bill is a Money Bill, and requests the senior judge of the Supreme Court, able and willing to act, to preside at such meeting.

It is not clear what would happen in the event of none of the Judges of the Supreme Court being able or willing to act, an eventuality which has never yet arisen. In such a case the Committee prescribed by the Constitution could not be constituted. If the Dáil should insist on passing the Bill as a Money Bill, without the assent of the Seanad, and if the Executive Council should present the Bill so passed by the Dáil to the Governor-General, the question of the validity of such a law, having regard to the terms of the Constitution, would in all probability be raised before the High Court, in accordance with the Sixty-Fifth Article.

In ordinary circumstances, however, the Chief Justice will preside. It is reasonable to assume that on most occasions on which this Committee is called into being, it will be as a result of a grave conflict of opinion between the Dáil and the Seanad, and that

consequently the elected representatives of each House will more than likely, hold opposing views, and that the decision of the Committee will really be that given by the Chief Justice. When the importance of the power of dealing with Money Bills and the jealousy with which the Popular Chamber in most Legislatures regards this power is considered, it will be realised how real and far-reaching is the power placed in the hands of the Judges by this singular provision of the Constitution.

The powers of the Irish Judiciary are very much greater than those possessed by either British or French judges. In neither of these countries do the Courts question the validity of any law passed in due form by the Legislature. Even the jurisdiction of American Judges is less wide than that of the Irish Courts. The conferring of such wide powers on the Irish Judges was designed as a check upon both the Executive and the Legislature and as a special safeguard for the liberty of the citizen. The very first case[27] which involved the validity of an act Oireachtas was decided against the Legislature and the Executive and in favour of the liberty of the citizen and it may be said that, in this respect, the Judicial provisions of the Irish Constitution have proved eminently fitted for the purpose for which they were designed.

[27] *Vide supra* p. 114. The late Court of Appeal which gave judgment in this case possessed, by virtue of the Seventy-Fifth Article, the same power of giving a final and conclusive decision on Constitutional issues as is now possessed by the Supreme Court.

CHAPTER VII.

THE CONSTITUENT POWER.

THE Irish Constitution of 1922 was designed as a Rigid Constitution, a single legal instrument prescribing the structure, powers and machinery of government in Saorstát Eireann.

The Rigid Constitution is the greatest of the contributions to Political Science which the world owes to the United States of America. "It is," to quote Lord Bryce, "an instrument set in a category by itself, raised above ordinary laws by the fact that it has been enacted and is capable of being changed, not in the same way as statutes are changed by the ordinary modes of legislation but in some specially prescribed way, so as to ensure for it a greater permanence and stability."[1] It is at one and the same time a recognition of the Sovereignty of the People, and a safeguard against the errors which the People are prone to commit, an admission of the truth that majorities are not always right.

In adopting a written constitution Ireland followed an almost universal practice amongst modern European States, only two of which, Great Britain and Hungary, have now unwritten constitutions.

I.—THE CONSTITUTIONAL REFERENDUM.

The Fiftieth Article of the Constitution is the logical sequel to the doctrine of the separation of the

1 Bryce. *Modern Democracies.* Vol. II, p. 10. London (1923).

Constituent and Legislative Powers, which as has been shown,[2] was recognised and strictly observed by the Constituent Assembly in 1922. This Article provides that amendments of the Constitution may be passed by the Oireachtas, but can only become effective when ratified by a Referendum. The Referendum in the case of Constitutional Amendments differs from the Referendum on ordinary legislation, provided by the deleted Forty-Seventh Article, in two respects. Firstly, it is an Obligatory Referendum. All proposed amendments to the Constitution, with the exception of those proposed before the 6th December, 1930, must be, in every case, submitted to the People by way of Referendum. Secondly, no proposed amendment can become effective unless a majority of the citizens entitled to vote take part in the Referendum, and in order to be ratified the amendment in question must receive the approval either of a majority of the citizens on the register or of two-thirds of those who vote. In the case of the Optional Referendum on ordinary legislation, a majority of the votes recorded sufficed to decide the question conclusively.

The words "within the terms of the Scheduled Treaty" in this Article do not place any absolute limitation to the scope of constitutional amendments, for the reason that these words would cease to be a part of the Constitution any time that an Amendment were passed deleting them from the Fiftieth Article. It could not be objected that the Constitution without these words would cease, *ipso facto*, to be in accordance with the Treaty. The effect of their deletion would only be that there would not be in the text of the Constitution any limitation on the scope or nature of Constitutional Amendments to be proposed and enacted in the prescribed manner. The Treaty would of course continue to bind the Oireachtas to fulfil its terms in the same manner as it binds the British Parliament so long as it exists. Its existence as an instrument, legally binding both parties, will

[2] *Vide* Chap. II.

continue until both parties agree to abrogate it, or until it becomes possible for one of the parties validly to denounce it, in accordance with the rules of International Law, and it is denounced accordingly.

II.—AMENDMENTS DURING THE FIRST EIGHT YEARS.

The framers of the American Constitution in their desire to prevent that Constitution being treated as "a scrap of paper" not merely provided that no amendment could be made unless it were proposed by at least two-thirds of each House of Congress, or a special convention, and ratified by three-fourths of the States, but they provided, in addition, that two clauses of the First Article could not be amended by any procedure before 1808, and that another provision could not be amended, strictly speaking, at any time.[3] That Constitution came into operation in 1789, and since that date nineteen amendments have been made. Of these nineteen amendments no less than ten were made in the one year 1791, and twelve out of the nineteen were made inside the first fifteen years.

This lesson appears not to have been lost on the Constituent Assembly in 1922. The Draft Constitution, like the American, provided that Constitutional Amendments could only be effected by the special procedure, which has been just described. The Constituent Assembly realised that the Constitution would, when in operation for a time, probably disclose latent defects. It was felt that it would be wise to allow amendments required as a consequence to be made in a less cumbrous manner. It was accordingly proposed to alter the Draft so as to permit of the Constitution being amended by way of ordinary legislation for the first five years, but on further consideration it was seen that the first Oireachtas would be so engrossed with consequential legislation arising out of the establishment of the new State that it would not be able to consider properly questions of constitutional moment. The period finally agreed

[3] Article V.

upon was the then maximum lifetime of two Dáil Eireann—namely, eight years. Accordingly, the Oireachtas was given the power of amending the Constitution by way of ordinary legislation until the 6th December, 1930.

The foresight of the Constituent Assembly in making it possible for the Oireachtas to amend the Constitution during the first eight years, by way of ordinary legislation, has on the whole been justified. Apart from the undefined Amendment effected by the Public Safety Act, 1927, which was only a temporary amendment, and one or two of the Amendments made in 1928 which neither improved or disimproved the Constitution, but were rather changes made for the sake of change, the Amendments so far made may be said to have improved the Constitution. They are moreover the type of amendments which the framers of the Constitution wished to have made without the cumbrous procedure of a Constitutional Referendum.

This power of the Oireachtas was intended to be and is purely transitory. Nevertheless it might have been wiser, if the Constituent Assembly had copied, in this respect, the precedent of the American Constitution makers and inserted a provision that the Fiftieth Article could not itself be amended within the eight years. This would have removed, still further, the possibility of the Oireachtas abusing the powers given to it by that Article, by extending that period indefinitely as it now can do, thereby making the Irish Constitution a Flexible Constitution.

III.—THE FIRST AMENDMENT.

The First Amendment was made on the 11th July, 1925, by the Constitution (Amendment No. 1) Act, 1925.[4] The amendment consisted in inserting two new Articles 31a and 32a in the Constitution, and altering the wording of the Thirty-Fourth Article. It was designed to define clearly certain details in connection with the reckoning of the duration of the

4. No. 30 of 1925.

term of office of Senators, and the limits of time for the holding of Seanad elections, which were found not to have been sufficiently covered by the Constitution.

A small committee under the chairmanship of the Chairman of Dáil Eireann was appointed in January, 1926, to review the Constitution generally, and to bring to the notice of the Executive Council any parts which it might consider desirable to amend. The report of this committee was never made public, but on the 16th November, 1926, President Cosgrave asked in the Dáil for leave to introduce Four Bills to amend the Constitution, all of which were subsequently passed by the Oireachtas.

IV.—THE SECOND AND THIRD AMENDMENTS.

The Second and Third Amendments to the Constitution became law on the same day, the 4th March, 1927, and both relate to the Twenty-Eighth Article.

The Second Amendment[5] provided for the deletion from that Article of the provision that the day on which a General Election for Dáil Eireann is held should be proclaimed a public holiday. The intention of the original provision was to secure that every elector should be free to record his vote on that day. It was found that, in practice, it resulted in considerable economic loss to the State, and was even the cause of hardship to individuals. It was felt also that if it were arranged by ordinary legislation for the polling booths to be kept open during such hours as would permit of all classes of voters exercising the franchise, such an arrangement would achieve the same object as that aimed at by this provision of the Twenty-Eighth Article, without entailing the same dislocation of business.

The Third Amendment[6] provided that Dáil Eireann

[5] Constitution (Amendment No. 3) Act, 1927. [No. 4 of 1927.]

[6] Constitution (Amendment No. 4) Act, 1927. [No. 5 of 1927.]

should continue for " six years or such shorter period as may be fixed by legislation " instead of for four years as the Twenty-Eighth Article provided originally. This amendment did not alter the period of the Dáil which passed it. It was generally admitted that a four years maximum lifetime was too short, and that the period should be five years. In order to allow the Oireachtas to prolong its own lifetime, in exceptional circumstances, the Amendment provided that the constitutional maximum period shall be six years, that is to say that the Oireachtas cannot continue longer than six years from the date of its first meeting, unless the Constitution is amended to permit of this. At the same time an undertaking was given by the Government to introduce legislation fixing the normal maximum lifetime of the Dáil at five years. This was effected by the Electoral (Amendment) Act, 1927, which provides that Dáil Eireann shall, unless earlier dissolved, continue for five years.

V.—THE FOURTH AMENDMENT.

The Fourth Amendment became law on the 19th March, 1927.[7] It altered the Twenty-First Article in such a way as to provide that the member of Dáil Eireann who is the Chairman of that House immediately before a dissolution shall be deemed to be re-elected a member of the Dáil, by his old constituency at the ensuing General Election, unless he announces, prior to the dissolution, his desire not to continue a member of Dáil Eireann.

This Amendment had its roots in the desire of all parties that the Chairman of Dáil Eireann should keep himself clear of party affiliations during his term

[7] Constitution (Amendment No. 2) Act, 1927. [No. 6 of 1927.]

of office.[8] As the Constitution stood originally if the Chairman desired to be returned as a member of the new Dáil, he was compelled to offer himself for re-election, but it was clear that, in such circumstances, his isolation from party affairs would be bound to militate against his prospects of re-election. It was felt that a member who had thus severed his party ties in order to serve the interests of the Dáil at large should not be left at a disadvantage when, as a result of a dissolution, he would cease to be Chairman and Deputy.

In Great Britain, where the Speaker of the House of Commons acts as a non-party-man, the return of the member who has acted as Speaker, up to a dissolution, is made practically certain by arrangement between the big political parties not to oppose his re-election to Parliament. In the Saorstát none of the Dáil constituencies is a single member constituency, and all elections are conducted under rules of Proportional Representation. Consequently, an arrangement to return the Chairman at a General Election automatically is rendered almost impossible.

The Bill as introduced provided that the Chairman of the Dáil would be deemed to be re-elected " as an additional member of Dáil Eireann not representing any constituency." There was much criticism of the Bill on this score in the Dáil as well as in the Seanad, although the measure first left the Dáil unaltered. It was objected that it would seriously alter the nature of the Dáil to permit of a person who would be representative of no constituency to have all the rights and privileges of a Deputy. It was contrary to the spirit of the Constitution and might, it was argued, conceivably lead to a person being appointed President who did not represent any section of the citizens. If the outgoing Chairman were not re-

[8] Professor Berriedale Keith in the preface to the 1928 edition of his *Responsible Government in the Dominions* attributes this amendment to the question of the oath, but there does not seem to be any substantial ground for this assumption.

elected Chairman of the new Dáil, and no obligation was placed on the new Dáil to re-elect him, he would become simply a distinguished stranger, "distinguished" as the Leader of the Labour Party, Mr. Johnson, put it, "because the previous Dáil allowed him to preside over their deliberations, but a stranger because he has not gone through the mill of election and does not represent any constituency, and may not be said to be in that assembly in a representative capacity."

The addition of even one vote to a party might make all the difference between the life and death of a Government, and even if the outgoing Chairman were re-elected Chairman he still could, in certain circumstances affect such matters. In moving in Seanad Eireann on the 9th February, 1927, an amendment to this Bill, Mr. O'Farrell referred to this very point. "If he is in the Chair he has a casting vote, although he is a person representing no constituency, and is an additional member. This may have very far-reaching and vital results." In this connection, it is worthy of note that the first member of Dáil Eireann to be returned in accordance with the amended Twenty-First Article, Mr. Mícheál O hAodha, by the exercise of his casting vote on the first occasion[9] that a casting vote was given by a Chairman of Dáil Eireann since the coming into operation of the Constitution, saved the Executive Council of the day from defeat, seventy-one Deputies having voted in favour of and seventy-one against a direct motion of no confidence.

Seanad Eireann amended the Bill so as to remove this objection to an additional member without a constituency, and this amendment was subsequently accepted by the Dáil. The outgoing Chairman of Dáil Eireann is now deemed to be re-elected as a member for the constituency, for which he was a member immediately before the dissolution, and the number of members actually elected by such consti-

[9] 16th August, 1927.

tuency in that case, is one less than the maximum, but the new Dáil is left free to elect or not this member as its Chairman.

The effect of this Fourth Constitutional Amendment is to achieve by means of an express provision of the Constitution that which is secured in Great Britain by the conventional agreement amongst parties to allow the Speaker of the House of Commons to be returned without opposition. It allows of the Dáil choosing the most suitable of its members to preside over its proceedings, and it enables the member so chosen to devote himself whole-heartedly and entirely to the service of that House, to withdraw himself from party ties in order to direct its proceedings with impartiality and detachment, with the assurance that he will not thereby be placed at a disadvantage when later the dissolution of the Assembly, over which he presides, takes place.

VI.—THE FIFTH AMENDMENT.

The Fifth Amendment which became law on the 5th May, 1927,[10] is more far reaching in its effects than any of the four which preceded it. It is an amendment dealing with question of Extern Ministers.

The object which it was hoped to attain by this Extern Minister System has already been explained at some length.[11] It was mentioned, *en passant*, that this system had not worked so well in practice. Speaking in Dáil Eireann on the Constitution (Amendment No. 5) Bill, Mr. Kevin O'Higgins gave the reason of this.[12] "Where it breaks down," he said, "is that every Department radiates into the Department of Finance. . . . All Departments radiate into the Department which much necessarily be within the Executive Council—the Department of Finance—so

[10] Constitution (Amendment No. 5) Act, 1927. No. 13 of 1927.]

[11] *Vide* Chapter V.

[12] *Dáil Debates.* Vol. 17, pp. 418 and 419

that this single responsibility of Extern Ministers is, I will not say entirely, but largely theoretical." This is unquestionably true. Nay more, the Public and even the Dáil, never adjusted their minds to the distinction between Extern Ministers and other Ministers, with the result that the latter were held to blame for unpopular acts and mistakes of the former. It was thought, therefore, desirable that each succeeding President, facing the position as he finds it on the day that he is appointed, should be at liberty to decide how much of the administration of the country would be in his hands and in the hands of the Ministers nominated by him and acting with him; and if he should think fit, that he should be able to bring the whole of that administration under the control of the Council of Ministers of which he is President.

The original Fifty-First Article prescribed that the Executive Council should be composed of not more than seven nor less than five Ministers "appointed by the Representative of the Crown on the nomination of the President of the Executive Council." These limits to the size of the Executive Council had been recommended to the Constituent Assembly by the Special Committee[13] which it appointed to consider the executive provisions of the Draft Constitution. Five was chosen as the minimum number on the grounds that any lesser number would tend to be dominated by one man, while it was considered that any more than seven might tend to the formation of a Cabinet within the Executive Council.

The Amendment proposed to substitute the word "twelve" for the word "seven" in the Article, thereby making it still mandatory on the President to nominate at least five Ministers, but leaving him with discretion to nominate any number up to twelve. When the Bill came before the Seanad it aroused considerable opposition. The Seanad showed distinctly that it felt that, sooner or later, and particularly if the number of members of the Executive Council were increased to twelve, its members should be made eligible for

[13] *Vide supra*, p. 48.

membership of the Executive Council which was not the case at that time. It was argued that the Bill prejudiced to a certain extent the slight chances that Senators actually had of being included in the Government by being made Extern Ministers. A resolution was passed inviting the Dáil to take part in the proceedings of a Joint Committee to be appointed to consider "the advisibility of amending the Articles of the Constitution which prevent members of the Seanad being appointed members of the Executive Council"; further consideration of the Bill being meanwhile postponed. The Dáil, however, declined absolutely to nominate any representatives, and showed itself definitely opposed to allowing Senators to have any part in the Executive Council, and eventually the Bill was passed by the Seanad without alteration.

This Amendment does not abolish the Extern Minister System, but merely leaves it to the option of the President to increase the number of Executive Council Ministers, nominated by him, beyond the former limit of seven. It exhibits a further tendency away from the original draft scheme, modelled on the Swiss System, and in the direction of the British or Cabinet System. It is noteworthy too that all the Governments constituted since this Amendment was made law have consisted entirely of Executive Council Ministers.

The Oireachtas does not appear to have noticed that this Amendment has made the Constitution self-contradictory in one respect. The Fifty-Second Article refers to the President as a "Minister." The Fifty-Fifth Article states that: "The total number of Ministers, including the Ministers of the Executive Council, shall not exceed twelve." But the Fifty-First Article as amended now provides that the Executive Council "shall consist of not more than twelve . . . . Ministers appointed . . . . on the nomination of the President of the Executive Council." Thus if the President were to exercise the right which this Article purports to confer on him, of having twelve

Ministers appointed as members of the Executive Council on his nomination he would commit a breach of the Fifty-Fifth Article, because there would then be thirteen Ministers. If, on the other hand, the real intention was to limit the total number of Ministers to twelve as in the past, the word "eleven" and not the word "twelve," should have been substituted in the Fifty-First Article in place of the deleted word "seven."

VII.—THE SIXTH AMENDMENT.

On the 12th July, 1928, the Sixth Amendment[14] was made law. It removed from the Constitution the Legislative Referendum, by deleting entirely the Forty-Seventh Article and making an amendment in the Fiftieth Article. It also deleted the Forty-Eighth Article which empowered the Oireachtas to provide for the Initiative, by way of ordinary legislation, and made a consequential amendment in the Fourteenth Article.

This Amendment met with vehement opposition in Dáil Eireann, and the Government resorted to the "Guillotine" in order to force it through, and so as to prevent a Referendum upon the Bill, under the provisions of the original Fiftieth Article, it was declared by both Houses to be "necessary for the immediate preservation of the public peace and safety." For five and a half years not a single Referendum had been held, and some time previously the Dáil had postponed consideration of a petition, prepared in accordance with the Forty-Eighth Article, pending a decision by the Oireachtas, as to how the petition should be presented. In the circumstances the danger to the State, likely to have arisen from a possible suspension of the Bill in question, is not very obvious. It was not the intention of the framers of

[14] Constitution (Amendment No. 10) Act, 1928. [No. 8 of 1928.]

the Constitution, when they inserted this proviso regarding " urgent " legislation, that it should be used, by an administration commanding a majority for the moment in the Oireachtas, for the purpose of defeating the rights of the minority to appeal to the People. The right of the Oireachtas to amend the Constitution by way of ordinary legislation was given for a very limited period. The procedure adopted to secure the passing of this amendment, though complying with the strict letter of the Constitution, was in reality a breach of its principles.

Moreover, unlike the amendments which preceded it, the Sixth Amendment was not of the type of amendment which was contemplated, when this power of amending the Constitution was given to the Oireachtas for the period of eight years. It altered the Constitution radically by abandoning one of the principles accepted in 1922 by the entire Constituent Assembly. It did not purport to mend some defect which was latent when the Constitution was before that Assembly. The Articles it deletes did not constitute a defect properly speaking, however they are regarded. In 1922, the principle of Direct Popular Legislation was accepted by the Constituent Assembly. It was obnoxious for various reasons, amongst which party interests must be reckoned, to a majority in the Oireachtas which passed the Sixth Amendment. It was never intended that, during the first eight years every line and clause of the Constitution which was displeasing to the majority of the Oireachtas, might be deleted or amended by ordinary legislation. Still less, was it contemplated that the Referendum on such legislation should be circumvented by the methods adopted in connection with the passing of this amendment.

The effect of the Sixth Amendment is firstly that the Optional Referendum on ordinary laws no longer exists. The People no longer constitute a part of the Legislative Power in Saorstát Eireann, and the Oireachtas has become the sole and exclusive legislator. The Constitutional Referendum, though sus-

pended in its operation until the 6th December, 1930, remains a part of the Constitution. Secondly, the Initiative which never formed a part of the Irish Constitution cannot any longer be provided by means of ordinary legislation. If at any time in the future it is desired to make provision for this type of Direct Popular Legislation, this can only be done by means of a Constitutional Amendment, enacted in the manner prescribed by the Constitution.

VIII.—THE SEVENTH AND EIGHTH AMENDMENTS.

Dissatisfaction with the working of the Seanad election machinery at the election held in 1925 led to a widespread demand for its replacement. This demand was supported even by that section of the population which was responsible for the state-wide constituency and other parts of that machinery. The election of 1925 was not held under normal conditions. It was deliberately boycotted by the second largest political party in the State. The other political parties sponsored party candidates, and paid little attention to the spirit of the Thirtieth Article. It is possible that under normal conditions and with further experience of its working, this machinery might have given satisfaction. Public opinion, however, did not favour its being given a second trial, and in view of that fact and of the approach of another election, due to be held at the end of 1928, a Joint Committee consisting of the Chairman and five members of each of the Houses of the Oireachtas was set up, in March of that year, at the suggestion of Seanad Eireann, for the purpose of considering and reporting on the changes, if any, necessary in the constitution and powers of and method of election to the Seanad. The Seventh[15] and Eighth[16] Amendments, which became law on the same

[15] Constitution (Amendment No. 6) Act, 1928. [No. 13 of 1928.]

[16] Constitution (Amendment No. 13) Act, 1928. [No. 14 of 1928.]

day, the 23rd July, 1928, both relate to Seanad Eireann and follow recommendations of this Joint Committee.

The Seventh Amendment abolished the state-wide constituency, and the right of all citizens, without distinction of sex, who had reached the age of thirty years to take part in Seanad elections. It provided instead that in future members of the Seanad should be elected by Dáil Eireann and Seanad Eireann voting conjointly, by secret ballot, and on principles of Proportional Representation.

The value or otherwise of this Amendment depends entirely upon the success or failure of the machinery for forming the panel provided by legislation in lieu of the old method already described which has ceased to exist as a result of the Tenth Amendment.[17]

The Eighth Amendment altered in parts the Thirty-Eighth Article and inserted a new Article, 38a, in the Constitution. Under the Constitution as adopted originally Seanad Eireann had no power to delay, by itself, a Bill passed by the Dáil for a period longer than two hundred and seventy days, from the date on which it had first been sent to the Seanad. A Bill passed by Dáil Eireann was deemed, at the expiration of that period, to have been passed by both Houses, notwithstanding the continued opposition of Seanad Eireann. The Eighth Amendment deleted these provisions and gave instead to the Seanad the increased power of suspending Bills passed by Dáil Eireann, save, of course, Money Bills, to which detailed reference has been made in a preceding chapter. The Eighth Amendment followed a recommendation of the Joint Committee, which advised the granting of a larger power of suspension by way of compensation for the withdrawal, from Seanad Eireann, of the right to compel a Referendum on ordinary laws.

The Eighth Amendment abolished, in addition, the provisions of the Thirty-Eighth Article which em-

[17] *Vide* p. 143.

powered Seanad Eireann to convene by resolution a joint sitting of both Houses for the special purpose of debating any Bill, save a Money Bill, sent to the Seanad by Dáil Eireann. This provision enabled the Seanad to make use of the advantage personal discussion has as compared with the printed word, when, in exceptional circumstances it might desire, for grave reasons, to win the assent of the Dáil, to the rejection or amendment of a particular legislative proposal. The abolition of this provision was not amongst the recommendations of the Joint Committee, but during the first six years use was not even once made of this provision. It gave no power to the joint Assembly to vote on any Bill and its deletion is a matter of comparatively little moment. It would nevertheless have probably been a wiser plan to give this particular provision a longer trial and to have observed its working in actual practice before condemning it.

IX.—THE NINTH AND TENTH AMENDMENTS.

The Ninth[18] and Tenth[19] Amendments also dealt with Seanad Eireann. Both became law upon the 25th October, 1928.

The former made all citizens, who have reached the age of thirty years, and are qualified to become members of the Dáil, eligible for membership of Seanad Eireann. Before this Amendment was passed, the Thirty-First Article restricted membership of the Seanad to citizens who had reached the age of thirty-five years, at least. That minimum age limit had been embodied as one of the provisions of the Constitution, in deference to the wishes of the representatives of the Unionist minority. It was intended thereby to give to Seanad Eireann a more deliberative and conservative character than Dáil Eireann. For no

[18] Constitution (Amendment No. 8) Act, 1928 [No. 27 of 1928.]

[19] Constitution (Amendment No. 9) Act, 1928 [No. 28 of 1928].

very obvious reason the Joint Committee, already referred to, recommended the reduction of this age-limit to thirty years, and the Ninth Amendment merely gave effect to this recommendation. It is difficult to understand how the constitution of Seanad Eireann is likely to be materially improved, in any way, by this change. At the same time it must be admitted that, at the worst, this Amendment is unlikely to work any harm.

The Tenth Amendment removed the old Thirty-Third Article and inserted a new Article which provides simply that the panel of candidates for election to Seanad Eireann shall be formed in a manner to be determined by legislation.

The Joint Committee recommended that the task of forming the panel should be entrusted to a Nominating College, subject to the right of Dáil Eireann and of Seanad Eireann to add a limited number of names, but they were unable to agree upon the manner of constituting this College, and contented themselves with recommending that it should be composed of persons representing Agriculture, Labour, Commerce, Education, and "National Development." What this last category is intended to include is not made clear.

The Constitution, as amended, determines the manner in which members of Seanad Eireann shall be elected, but curiously enough, it leaves to the Oireachtas the task of dealing, by means of ordinary legislation, with the more important question of the formation of the panel of candidates. The formation of the panel is of greater moment than the method of election, because no electorate can create a Seanad, such as the Constitution contemplates, out of a panel of candidates who are not of the proper type; while, on the contrary, if the panel be composed entirely, or almost entirely, of citizens who have done honour to the Nation, or represent important aspects of the Nation's life, it matters little what body constitutes the electorate.

As an Amendment of the Constitution, the Tenth Amendment cannot be regarded as satisfactory.. It

provides no solution of the real problem, upon which, as has been already remarked, depends the success of the Seventh Amendment, and indeed of all those provisions of the Constitution which deal with Seanad Eireann and its working as a part of a bi-cameral Legislature.

The Seanad Electoral Act, 1928,[20] which is complimentary to the Tenth Amendment and prescribes the manner in which the panel shall be formed, does not follow the recommendation of the Joint Committee with respect to the Nominating College. Instead, it gives to the Dáil and the Seanad, the same bodies as now, by virtue of the Seventh Amendment, form the electorate the power of nominating candidates. The effect of this legislation has been to make the Seanad a bone of contention between the political parties and groups in the same manner as the Dáil. Candidates are now officially nominated and sponsored by the different parties. Each party calculates as accurately as it is able, the number of seats it may reasonably hope to win at a Seanad election and nominates a corresponding number of supporters for these seats. The fact that any of these candidates happens to have done honour to the Nation, by reason of useful public service, or to represent important aspects of Nation's life is a mere accident and of secondary importance. The first and chief consideration is allegiance to a political party. So long as this method of forming the panel of candidates is continued, no electorate that could be imagined would be able to elect therefrom a Seanad, such as is contemplated by the Thirtieth Article of the Constitution. Whatever may have been the defects of the original provisions of the Constitution with regard to this matter, they were better fitted to secure the nomination and election to Seanad Eireann of the proper type of citizen, than those Constitutional and Legislative provisions which have now been substituted for them.

[20] No. 29 of 1928.

X.—THE ELEVENTH AMENDMENT.

The Eleventh Amendment[21] was the last of the changes made in the Constitution with a view to having the Seanad election of 1928 conducted upon new lines. It came into effect upon the 30th October, 1928, and like the four preceding Constitutional Amendments embodied recommendations of the Joint Committee on the Constitution of Seanad Eireann.

Some of its provisions dealt with minute details of that election and need not concern us here. The general effect of the Amendment was to reduce the term of office of members of the Seanad from twelve years to nine years. One-third of the members of Seanad Eireann will retire in future every three years instead of one-fourth, as heretofore. A larger change in personnel will take place triennially. Senators will as a consequence, be less independent and be more inclined to consider the effect of their actions upon public opinion.

It is very questionable whether this is a thing to be desired in the case of a Chamber which is designed to act as a brake upon the working of a popular assembly elected upon the widest franchise. If the Seanad had, under the former system, shown that it was regardless of popular wishes and its members had abused the comparative independence of popular control which they enjoyed, some such change would have become, not merely desirable, but necessary. But Seanad Eireann did not at any time show a tendency to act in any such manner. During the years preceding this change, 1922 to 1927, the Seanad passed without amendment a little less than three-fifths of the ordinary non-money bills sent to it by Dáil Eireann. With respect to the remaining two-fifths the Seanad made eight hundred and fifty-six amendments, and of that number only seventeen were rejected by Dáil Eireann. Every recommenda-

[21] Constitution (Amendment No. 7) Act, 1928 [No. 39 of 1928].

tion made by the Seanad to the Dáil with regard to Money Bills was accepted, and only one Money Bill, which the Seanad did not pass, was made law in spite of its opposition. In addition, of eight Bills initiated in and passed by Seanad Eireann during that period, only one failed to become law through being rejected by the other House.

The most that can be said of this Constitutional Amendment is that, like the Ninth Amendment, it has not in any way bettered the Constitution, but is not likely to do harm.

XI.—THE PUBLIC SAFETY ACT, 1927.[22]

The Constitution of a country is a sacred thing not to be lightly tampered with or changed. It is the original source of all jurisdiction in the State, and as regards the whole code of law it is the one and all sufficient root of title. It is on a higher plane than ordinary laws, and to mark this fact in most modern States the work of amending the Constitution is reserved to a special organ, distinct from the ordinary legislative organ.

This peculiar sanctity of Constitutions has been recognised by the Oireachtas, even though the power to amend the Irish Constitution is provisionally confided in the Oireachtas itself. It was recognised that amendments of the Constitution which were to be made by way of ordinary legislation, ought to be made in a particularly solemn manner; and there was a consensus of opinion that each amendment of the Constitution should be set out explicitly and in detail and in a separate Act. This was actually done in the cases of the first five amendments.

As a consequence of the assassination of Mr. Kevin O'Higgins, who was at the time of his death Vice-President of the Executive Council, the Government introduced a Public Safety Bill which became law on the 11th August, 1927, and continued in force until the end of 1928.

[22] No. 31 of 1927.

This measure was designed to defeat a conspiracy which the Oireachtas believed to exist and to be directed against the very existence of the State by persons who had refused to recognise the Constitution ever since it came into force. It conferred extremely wide powers on the Executive, and authorised amongst other things the setting up of extraordinary Courts, the suppression of periodicals, the declaring of certain associations to be unlawful, and the entry into and searching of premises.

Section 3 of the Act provided that: "Every provision of this Act which is in contravention of any provision of the Constitution shall to the extent of such contravention operate and have effect as an amendment, for so long only as this Act continues in force, of such provision of the Constitution."

This undefined Amendment of the Constitution made it almost impossible for any body, other than a Court of Law, to say with certainty how many provisions of the Public Safety Act, 1927, contravened the Constitution, and consequently where the Constitution was to be considered as amended.

A vague and general amendment such as this, undoubtedly tends to lower the Constitution in the eyes of the Nation. This Act would have enabled an unscrupulous Executive practically to suspend the Constitution at any time during the time it was in force. Yet the *raison d'être* of a Rigid Constitution is to place a check upon the abusive use of Executive Authority, to stand between the Executive and the citizen.

The very exceptional circumstances which required the introduction of this measure imposed, in the opinion of the Oireachtas, the necessity of passing it into law. It is to be deplored none the less as a Constitutional Amendment, and it is to be hoped that this temporary and indefinite amending of the Constitution will not be considered as creating a precedent, but that all other Amendments will be made, by separate Acts setting forth in clear and precise terms the details of such amendments.

XII.—AMENDMENT BY IMPLICATION.

It has been questioned whether the provision in the Fiftieth Article by which amendments may be made until 1930 by way of ordinary legislation, has the effect that any Act passed by the Oireachtas in the intervening period which in effect contravenes the Constitution, as passed, ipso facto, amends it.

This point has not yet been explicitly considered by the High Court, and for that reason is still an open question. There can be no doubt that Mr. Johnson expressed the mind of the Dáil when he stated that there was "general agreement that no Bill should be considered to be an amendment of the Constitution unless it was specifically declared to be such." However, the Courts are in no way bound to interpret the Constitution in the way it is interpreted by the members of the Oireachtas. Nevertheless it would seem probable, to judge by the cases involving the validity of laws, which have already come before the Courts, that the Courts do not consider that any such intention is implied in every Act of the Oireachtas, and the decisions in these cases seem to indicate that if this point does, at some time, come before the High Court, the Court will hold that ordinary Acts of the Oireachtas are presumed to be passed subject to the existing provisions of the Constitution, unless an intention to amend that instrument is clearly and explicitly made manifest. To hold otherwise would be to create an impossible situation. If every Act passed now were to imply an intention to amend the Constitution wherever that instrument is contravened, every such implied amendment would, after the 6th December, 1930, become rigid and could only be altered by means of a Special Act of the Oireachtas, ratified by a Constitutional Referendum.

APPENDIX I.

THE ANGLO-IRISH TREATY.

ARTICLES OF AGREEMENT FOR A TREATY BETWEEN GREAT BRITAIN AND IRELAND.

1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

3. The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments.

4. The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form:—

> I . . . . do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H.M. King George V, his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

5. The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and

equitable, having regard to any just claims on the part of Ireland by way of set off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.

6. Until an arrangement has been made between the British and Irish Governments whereby the Irish Free State undertakes her own coastal defence, the defence by sea of Great Britain and Ireland shall be undertaken by His Majesty's Imperial Forces. But this shall not prevent the construction or maintenance by the Government of the Irish Free State of such vessels as are necessary for the protection of the Revenue or the Fisheries.

The foregoing provisions of this Article shall be reviewed at a Conference of Representatives of the British and Irish Governments to be held at the expiration of five years from the date hereof with a view to the undertaking by Ireland of a share in her own coastal defence.

7. The Government of the Irish Free State shall afford to His Majesty's Imperial Forces :—

(*a*) In time of peace such harbour and other facilities as are indicated in the Annex hereto, or such other facilities as may from time to time be agreed between the British Government and the Government of the Irish Free State; and

(*b*) In time of war or of strained relations with a Foreign Power such harbour and other facilities as the British Government may require for the purposes of such defence as aforesaid.

8. With a view to securing the observance of the principle of international limitation of armaments, if the Government of the Irish Free State establishes and maintains a military defence force, the establishments thereof shall not exceed in size such proportion of the military establishments maintained in Great Britain as that which the population of Ireland bears to the population of Great Britain.

9. The ports of Great Britain and the Irish Free State shall be freely open to the ships of the other country on payment of the customary port and other dues.

10. The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of Police Forces and other Public Servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof.

Provided that this agreement shall not apply to members of the Auxiliary Police Force or to persons recruited in Great Britain for the Royal Irish Constabulary during the two years next preceding the date hereof. The British Government will

assume responsibility for such compensation or pensions as may be payable to any of these excepted persons.

11. Until the expiration of one month from the passing of the Act of Parliament for the ratification of this instrument, the powers of the Parliament and the government of the Irish Free State shall not be exercisible as respects Northern Ireland and the provisions of the Government of Ireland Act, 1920, shall so far as they relate to Northern Ireland remain of full force and effect, and no election shall be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland, unless a resolution is passed by both Houses of the Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.

12. If before the expiration of the said month, an address is presented to His Majesty by both Houses of the Parliament of Northern Ireland to that effect, the powers of the Parliament and Government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act, 1920 (including those relating to the Council of Ireland) shall so far as they relate to Northern Ireland, continue to be of full force and effect, and this instrument shall have effect subject to the necessary modifications.

Provided that if such an address is so presented a Commission consisting of three persons, one to be appointed by the Government of the Irish Free State, one to be appointed by the Government of Northern Ireland and one who shall be Chairman to be appointed by the British Government shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.

13. For the purpose of the last foregoing article, the powers of the Parliament of Southern Ireland under the Government of Ireland Act, 1920, to elect members of the Council of Ireland shall after the Parliament of the Irish Free State is constituted be exercised by that Parliament.

14. After the expiration of the said month, if no such address as is mentioned in Article 12 hereof is presented, the Parliament and Government of Northern Ireland shall continue to exercise as respects Northern Ireland the powers conferred on them by the Government of Ireland Act, 1920, but the Parliament and Government of the Irish Free State shall in Northern Ireland have in relation to matters in respect of which the Parliament of Northern Ireland has not power to make laws under that Act (including matters which

under the said Act are within the jurisdiction of the Council of Ireland) the same powers as in the rest of Ireland subject to such other provisions as may be agreed in manner hereinafter appearing.

15. At any time after the date hereof the Government of Northern Ireland and the Provisional Government of Southern Ireland hereinafter constituted may meet for the purpose of discussing the provisions subject to which the last foregoing article is to operate in the event of no such address as is therein mentioned being presented and those provisions may include:

(*a*) Safeguards with regard to patronage in Northern Ireland:

(*b*) Safeguards with regard to the collection of revenue in Northern Ireland:

(*c*) Safeguards with regard to import and export duties affecting the trade or industry of Northern Ireland:

(*d*) Safeguards for minorities in Northern Ireland:

(*e*) The settlement of the financial relations between Northern Ireland and the Irish Free State.

(*f*) The establishment and powers of a local militia in Northern Ireland and the relation of the Defence Forces of the Irish Free State and of Northern Ireland respectively:

and if at any such meeting provisions are agreed to, the same shall have effect as if they were included amongst the provisions subject to which the Powers of the Parliament and Government of the Irish Free State are to be exercisible in Northern Ireland under Article 14 hereof.

16. Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school or make any discrimination as respects state aid between schools under the management of different religious denominations or divert from any religious denomination or any educational institution any of its property except for public utility purposes and on payment of compensation.

17. By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a

provisional Government, and the British Government shall take the necessary steps to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof.

18. This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and if approved shall be ratified by the necessary legislation.

On behalf of the British Delegation.	On behalf of the Irish Delegation.
(*Signed*)	(*Signed*)
D. LLOYD GEORGE.	ART O GRIOBHTHA.
AUSTEN CHAMBERLAIN.	(Arthur Griffith.)
BIRKENHEAD.	MICHEAL O COILEAIN.
WINSTON S. CHURCHILL.	RIOBARD BARTUN.
L. WORTHINGTON-EVANS.	EUDHMONN S. O'DUGAIN.
HAMAR GREENWOOD.	SEORSA GHABHAIN UI DHUBHTHAIGH.
GORDON HEWART.	

December 6, 1921.

ANNEX.

1. The following are the specific facilities required.

DOCKYARD PORT AT BEREHAVEN.

(*a*) Admiralty property and rights to be retained as at the date hereof. Harbour defences to remain in charge of British care and maintenance parties.

QUEENSTOWN.

(*b*) Harbour defences to remain in charge of British care and maintenance parties. Certain mooring buoys to be retained for use of His Majesty's ships.

BELFAST LOUGH.

(*c*) Harbour defences to remain in charge of British care and maintenance parties.

LOUGH SWILLY.

(*d*) Harbour defences to remain in charge of British care and maintenance parties.

AVIATION.

(*e*) Facilities in the neighbourhood of the above Ports for coastal defence by air.

OIL FUEL STORAGE.

(*f*) Haulbowline / Rathmullen. — To be offered for sale to commercial companies under guarantee that purchasers shall maintain a certain minimum stock for Admiralty purposes.

2. A Convention shall be made between the British Government and the Government of the Irish Free State to give effect to the following conditions .—

(*a*) That submarine cables shall not be landed or wireless stations for communication with places outside Ireland be established except by agreement with the British Government; that the existing cable landing rights and wireless concessions shall not be withdrawn except by agreement with the British Government; and that the British Government shall be entitled to land additional submarine cables or establish additional wireless stations for communication with places outside Ireland.

(*b*) That lighthouses, buoys, beacons, and any navigational marks or navigational aids shall be maintained by the Government of the Irish Free State as at the date hereof and shall not be removed or added to except by agreement with the British Government.

(*c*) That war signal stations shall be closed down and left in charge of care and maintenance parties, the Government of the Irish Free State being offered the option of taking them over and working them for commercial purposes subject to Admiralty inspection, and guaranteeing the upkeep of existing telegraphic communication therewith.

3. A Convention shall be made between the same Governments for the regulation of Civil Communication by Air.

D Ll G. B.
A C

A. G.
W S C M O'C
E. S. O'D. R. B.
S. G. D.

APPENDIX II.

PROCLAMATION SUMMONING THE CONSTITUENT ASSEMBLY.

[OFFICIAL TRANSLATION.]

In the Matter of the Treaty between Great Britain and Ireland signed at London on the 6th day of December, 1921, and the Irish Free State (Agreement) Act, 1921.

By the Irish Provisional Government.

A PROCLAMATION DECLARING THE CALLING OF A PARLIAMENT IN IRELAND.

WHEREAS We, Mícheál O Coileáin, Liam T. Mac Cosgair, Eamon O Dugáin, Padraig O hÓgáin, Fionán O Loinsigh, Seosamh Mag Craith, Eoin MacNéill and Caoimhghin O hUigín have been duly constituted a Provisional Government pursuant to Article 17 of the Articles of Agreement for a Treaty between Great Britain and Ireland signed at London on the 6th day of December, 1921, and set forth in the Schedule of an Act entitled the Irish Free State (Agreement) Act, 1922.

And whereas the said Act contains provisions with respect to the holding of an Election and the constitution of a House of Parliament to which we, the said Provisional Government, shall be responsible.

Now we, the said Provisional Government, pursuant to the provisions of the said Act and being desirous and resolved to meet the people of Ireland and have their advice in Parliament do hereby make known to all our decision to call the said Parliament; and do hereby further declare that we have given order that, upon notice thereof, summonses shall be issued forthwith in due form calling the said Parliament to meet at the City of Dublin on the first day of July next.

Published at Dublin this 27th day of May, 1922.

APPENDIX III.

THE FINAL DRAFT CONSTITUTION.

These presents shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Schedule hereto annexed (hereinafter referred to as "the Scheduled Treaty") which are hereby given the force of law, and if any provision of this Constitution or of any amendment thereof, or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy be absolutely void and inoperative, and the Parliament/Oireachtas and the Executive Council/Aireacht of the Irish Free State/Saorstát Eireann shall respectively, pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.

SECTION I.—FUNDAMENTAL RIGHTS.

Article 1.

The Irish Free State/Saorstát Eireann is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.

Article 2.

All powers of government and all authority, legislative, executive, and judicial, are derived from the people, and the same shall be exercised in the Irish Free State/Saorstát Eireann through the organisations established by, or under, and in accord with, this Constitution.

Article 3.

Every person domiciled in the Irish Free State/Saorstát Eireann at the time of the coming into operation of this Constitution who was born in Ireland, or either of whose parents was born in Ireland, or who has been so domiciled in the area of the jurisdiction of the Irish Free State/Saorstát Eireann for not less than seven years is a citizen of the Irish

Free State/Saorstát Eireann, and shall within the limits of the Irish Free State/Saorstát Eireann enjoy the privileges and be subject to the obligations of such citizenship, provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State/Saorstát Eireann shall be determined by law. Men and women have equal rights as citizens.

Article 4.

The national language of the Irish Free State/Saorstát Eireann is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament/Oireachtas for districts or areas in which only one language is in use.

Article 5.

No title of honour in respect of any services rendered in or in relation to the Irish Free State/Saorstát Eireann may be conferred on any citizen of the Irish Free State/Saorstát Eireann, except with the approval or upon the advice of the Executive Council of the State.

Article 6.

The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court/Ard Chuirt, and any and every judge thereof, shall forthwith enquire into the same, and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or Judge without delay, and to certify in writing as to the cause of the detention, and such Court or Judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with law.

Article 7.

The dwelling of each citizen is inviolable, and shall not be forcibly entered except in accordance with law.

Article 8.

Freedom of conscience and the free profession and practice of religion are inviolable rights of every citizen, and no law may be made, either directly or indirectly, to endow any

religion, or prohibit or restrict the free exercise thereof, or give any preference or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water, or drainage works or other works of public utility, and on payment of compensation.

Article 9.

The right of free expression of opinion, as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious, or class distinction.

Article 10.

All citizens of the Irish Free State/Saorstát Eireann have the right to free elementary education.

Article 11.

The rights of the State in and to natural resources, the use of which is of national importance, shall not be alienated. Their exploitation by private individuals or associations shall be permitted only under State supervision, and in accordance with conditions and regulations approved by legislation.

SECTION II.—LEGISLATIVE PROVISIONS.

A.—THE LEGISLATURE.

Article 12.

A Legislature is hereby created, to be known as the Parliament/Oireachtas of the Irish Free State/Saorstát Eireann. It shall consist of the King and two Houses: the Chamber of Deputies/Dáil Eireann and the Senate/Seanad Eireann. The power of making laws for the Peace, Order, and good Government of the Irish Free State/Saorstát Eireann is vested in the Parliament/Oireachtas.

Article 13.

The Parliament/Oireachtas shall sit in or near the City of Dublin, or in such other place as from time to time it may determine.

Article 14.

All citizens of the Irish Free State/Saorstát Eireann, without distinction of sex, who have reached the age of twenty-one years, and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of the Chamber of Deputies/Dáil Eireann, and to take part in the Referendum or Initiative. All citizens of the Irish Free State/Saorstát Eireann, without distinction of sex, who have reached the age of thirty years, and who comply with the provisions of the prevailing electoral laws shall have the right to vote for members of the Senate/Seanad Eireann. No voter may exercise more than one vote, and the voting shall be by secret ballot. The mode and place of exercising this right shall be determined by law.

Article 15.

Every citizen who has reached the age of twenty-one years, and who is not placed under disability or incapacity by the Constitution or by law, shall be eligible to become a member of the Chamber of Deputies/Dáil Eireann.

Article 16.

No person may be at the same time a member both of the Chamber/Dáil Eireann and of the Senate/Seanad Eireann.

Article 17.

The oath to be taken by Members of Parliament/Oireachtas shall be in the following form :—

> I ... . do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to H.M. King George V, his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

Such oath shall be taken and subscribed by every member of the Parliament/Oireachtas before taking his seat therein before the representative of the Crown or some person authorised by him.

Article 18.

Every member of the Parliament/Oireachtas shall, except in case of treason, felony, or breach of the peace, be privileged from arrest in going to and returning from, and while within

the precincts of either House, and shall not be amenable to any action or proceeding at law in respect of any utterance in either House.

Article 19.

All reports and publications of the Parliament/Oireachtas, or of either House thereof, shall be privileged, and utterances made in eithef House, wherever published, shall be privileged.

Article 20.

Each House shall make its own rules and Standing Orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting, or attempting to corrupt its members in the exercise of their duties.

Article 21.

Each House shall elect its own Chairman and Deputy-Chairman, and shall prescribe their powers, duties, and terms of office.

Article 22.

All matters in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present other than the Chairman or presiding member, who shall have and exercise a casting vote in the case of an equality of votes. The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its Standing Orders.

Article 23.

The Parliament/Oireachtas shall make provision for the payment of its members, and may, in addition, provide them with free travelling facilities in any part of Ireland.

Article 24.

The Parliament/Oireachtas shall hold at least one session each year. The Parliament/Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King, and subject as aforesaid, the Chamber/Dáil Eireann shall fix the date of re-assembly of the Parliament/Oireachtas and the date of the conclusion of the session of each House, provided that the sessions of the Senate/Seanad Eireann shall not be concluded without its own consent.

Article 25.

Sittings of each House of the Parliament/Oireachtas shall be public In cases of special emergency either House may hold a private sitting with the assent of two-thirds of the members present.

SECTION II.—LEGISLATIVE PROVISIONS.

B.—THE CHAMBER OF DEPUTIES/DAIL EIREANN.

Article 26.

The Chamber/Dáil Eireann shall be composed of members who represent constituencies determined by law. The number of members shall be fixed from time to time by the Parliament/Oireachtas, but the total number of members of the Chamber/Dáil Eireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population, provided that the proportion between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census shall, as far as possible, be identical throughout the country. The members shall be elected upon principles of Proportional Representation. The Parliament/Oireachtas shall revise the constituencies at least once in every ten years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of the Chamber/Dáil Eireann sitting when such revision is made.

Article 27.

At a General Election for the Chamber/Dáil Eireann the polls shall be held on the same day throughout the country, and that day shall be a day not later than thirty days after the date of the dissolution, and shall be proclaimed a public holiday. The Chamber/Dáil Eireann shall meet within one month of such day, and shall, unless earlier dissolved, continue for four years from the date of its first meeting, and not longer. The Chamber/Dáil Eireann may not at any time be dissolved except on the advice of the Executive Council/Aireacht.

Article 28.

In the case of death, resignation or disqualification of a member of the Chamber/Dáil Eireann, the vacancy shall be filled by election in manner to be determined by law.

SECTION II.—LEGISLATIVE PROVISIONS.

C.—THE SENATE/SEANAD EIREANN.

Article 29.

The Senate/Seanad Eireann shall be composed of citizens who have done honour to the nation by reason of useful public service, or who, because of special qualifications or attainments, represent important aspects of the nation's life.

Article 30.

Every University in the Irish Free State/Saorstát Eireann shall be entitled to elect two representatives to the Senate/Seanad Eireann. The number of Senators, exclusive of the University members, shall be fifty-six. A citizen to be eligible for membership of the Senate/Seanad Eireann must be a person eligible to become a member of the Chamber/Dáil Eireann, and must have reached the age of thirty-five years. Subject to any provision for the Constitution of the first Senate/Seanad Eireann, the term of office of a member of the Senate/Seanad Eireann shall be twelve years.

Article 31.

One-fourth of the members of the Senate/Seanad Eireann, exclusive of the University members, shall be elected every three years from a panel constituted as hereinafter mentioned at an election at which the Irish Free State/Saorstát Eireann shall form one electoral area, and the elections shall be held on principles of Proportional Representation. One member shall be elected by each University entitled to representation in the Senate/Seanad Eireann every six years.

Article 32.

Before each election of members of the Senate/Seanad Eireann (other than University members) a panel shall be formed consisting of :—

(*a*) Three times as many qualified persons as there are members to be elected of whom two-thirds shall be nominated by the Chamber/Dáil Eireann voting according to principles of Proportional Representation, and one-third shall be nominated by the Senate/Seanad Eireann voting according to principles of Proportional Representation; and

(*b*) Such persons who have at any time been members of the Senate/Seanad Eireann (including members about to retire) as signify by notice in writing addressed to the President/Uachtaran of the Executive Council their desire to be included in the panel.

The method of proposal and selection for nomination shall be decided by the Chamber/Dáil Eireann and Senate/Seanad Eireann respectively, with special reference to the necessity for arranging for the representation of important interests and institutions in the country provided that each proposal shall be in writing and shall state the qualifications of the person proposed. As soon as the panel has been formed a list of the names of the members of the panel, arranged in alphabetical order, with their qualifications, shall be published.

Article 33.

In case of the death, resignation, or disqualification, of a member of the Senate/Seanad Eireann (other than a University member) his place shall be filled by a vote of the Senate/Seanad Eireann. Any Senator so chosen shall retire from office at the conclusion of the three years' period then running, and the vacancy or vacancies thus created shall be additional to the places to be filled under Article 31. The term of office of the members chosen at the election, after the first fourteen elected, shall conclude at the end of the period or periods at which the Senator or Senators by whose death or withdrawal the vacancy or vacancies was or were originally created would be due to retire provided that the fifteenth member shall be deemed to have filled the vacancy first created in order of time, and so on.

In case of death, resignation, or disqualification of a University member of the Senate/Seanad Eireann the University by which he was elected shall elect a person to fill his place, and the member so elected shall hold office so long as the member in whose place he was elected would have held office.

SECTION II.—LEGISLATIVE PROVISIONS.

D.—LEGISLATION.

Article 34.

The Chamber/Dáil Eireann shall in relation to the subject matter of Money Bills as hereinafter defined have legislative authority exclusive of the Senate/Seanad Eireann.

A Money Bill means a Bill which contains only provisions dealing with all or any of the following subjects—namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof;

subordinate matters incidental to those subjects or any of them. In this definition the expressions " taxation," " public money " and " loan " respectively do not include any taxation money or loan raised by local authorities or bodies for local purposes.

The Chairman of the Chamber/Dáil Eireann shall certify any Bill which in his opinion is a Money Bill to be a Money Bill, but, if within three days after a Bill has been passed by the Chamber/Dáil Eireann two-fifths of the members of either House by notice in writing addressed to the Chairman of the House of which they are members so require the question whether the Bill is or is not a Money Bill shall be referred to a Committee of Privileges consisting of three members elected by each House with a Chairman who shall be the senior judge of the Supreme Court, able and willing to act, and who in the case of an equality of votes, but not otherwise, shall be entitled to vote. The decision of the Committee on the question shall be final and conclusive.

Article 35.

The Chamber/Dáil Eireann shall as soon as possible after the commencement of each financial year consider the Budget of receipts and expenditure of the Irish Free State/Saorstát Eireann for that year, and, save in so far as may be provided by specific enactment in each case the legislation required to give effect to the Budget of each year shall be enacted within that year.

Article 36.

Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council.

Article 37.

Every Bill initiated in and passed by the Chamber/Dáil Eireann shall be sent to the Senate/Seanad Eireann, and may, unless it be a Money Bill, be amended in the Senate/Seanad Eireann and the Chamber/Dáil Eireann shall consider any such amendment; but a Bill passed by the Chamber/Dáil Eireann and considered by the Senate/Seanad Eireann shall not later than two hundred and seventy days after it shall have been first sent to the Senate/Seanad Eireann, or such longer period as may be agreed upon by the two Houses, be deemed to be passed by both Houses in its form as last passed by the Chamber/Dáil Eireann, provided that any Money Bill shall be sent to the Senate/Seanad Eireann for its recommendations, and at a period not longer

than fourteen days after it shall have been sent to the Senate/Seanad Eireann, it shall be returned to the Chamber/Dáil Eireann which may pass it, accepting or rejecting all or any of the recommendations of the Senate/Seanad Eireann, and as so passed shall be deemed to have been passed by both Houses. When a Bill other than a Money Bill has been sent to the Senate/Seanad Eireann a Joint Sitting of the Members of both Houses may on a resolution passed by the Senate/Seanad Eireann be convened for the purpose of debating, but not of voting upon, the proposals of the Bill or any amendment of the same.

Article 38.

A Bill may be initiated in the Senate/Seanad Eireann, and if passed by the Senate/Seanad Eireann shall be introduced into the Chamber/Dáil Eireann. If amended by the Chamber/Dáil Eireann the Bill shall be considered as a Bill initiated in the Chamber/Dáil Eireann. If rejected by the Chamber/Dáil Eireann it shall not be introduced again in the same session, but the Chamber/Dáil Eireann may reconsider it on its own motion.

Article 39.

A Bill passed by either House and accepted by the other House shall be deemed to be passed by both Houses.

Article 40.

As soon as any Bill shall have been passed or deemed to have been passed by both Houses, the Executive Council shall present the same to the Representative of the Crown for the signification by him in the King's name of the King's assent, and such Representation may withhold the King's assent or reserve the Bill for the signification of the King's pleasure, provided that the Representative of the Crown shall in the withholding of such assent to or the reservation of any Bill act in accordance with the law, practice, and constitutional usage governing the like withholding of assent or reservation in the Dominion of Canada.

A Bill reserved for the signification of the King's pleasure shall not have any force unless and until within one year from the day on which it was presented to the Representative of the Crown for the King's Assent the Representative of the Crown signifies by speech or message to each of the Houses of the Parliament/Oireachtas or by proclamation that it has received the Assent of the King in Council.

An entry of every such speech, message, or proclamation shall be made in the *Journal* of each House, and a duplicate thereof duly attested shall be delivered to the proper officer;

to be kept among the Records of the Irish Free State/Saorstát Eireann.

Article 41.

As soon as may be after any law has received the King's assent, the Clerk, or such officer as the Chamber/Dáil Eireann may appoint for the purpose, shall cause two fair copies of such law to be made, one being in the Irish language and the other in the English language (one of which copies shall be signed by the Representative of the Crown, to be enrolled for record in the office of such officer of the Supreme Court as the Chamber/Dáil Eireann may determine), and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies so deposited, that signed by the Representative of the Crown shall prevail.

Article 42.

The Parliament/Oireachtas shall have no power to declare acts to be infringements of the law which were not so at the date of their commission.

Article 43.

The Parliament/Oireachtas may create subordinate legislatures, but it shall not confer thereon any powers in respect of the Navy, Army or Air Force, alienage or naturalisation, coinage, legal tender, trade marks,, designs, merchandise marks, copyright, patent rights, weights and measures, submarine cables, wireless telegraphy, post office, railways, aerial navigation, customs and excise.

Article 44.

The Parliament/Oireachtas may provide for the establishment of Functional or Vocational Councils, representing branches of the social and economic life of the nation. A Law establishing any such Council shall determine its powers, rights and duties, and its relations to the Government of the Irish Free State/Saorstát Eireann.

Article 45.

The Parliament/Oireachtas has the exclusive right to regulate the raising and maintaining of such armed forces as are mentioned in the Scheduled Treaty in the territory of the Irish Free State/Saorstát Eireann, and every such force shall be subject to the control of the Parliament/Oireachtas.

SECTION II.—LEGISLATIVE PROVISIONS.

E.—REFERENDUM AND INITIATIVE.

Article 46.

Any Bill passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the written demand of two-fifths of the members of the Chamber/Dáil Eireann or of a majority of the members of the Senate/Seanad Eireann presented to the President of the Executive Council not later than seven days from the day on which such Bill shall have been so passed or deemed to have been so passed. Such a Bill shall be submitted by Referendum to the decision of the people if demanded before the expiration of the ninety days either by a resolution of the Senate/Seanad Eireann assented to by three-fifths of the Members of the Senate/Seanad Eireann or by a petition signed by not less than one-twentieth of the voters then on the register of voters, and the decision of the people on such Referendum shall be conclusive. These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety.

Article 47.

The Parliament/Oireachtas may provide for the initiation by the people of proposals for laws or constitutional amendments. Should the Parliament/Oireachtas fail to make such provision within two years, it shall, on the petition of not less than one hundred thousand voters on the register, of whom not more than twenty-thousand shall be voters in any one constituency, either make such provision or submit the question to the people for decision in accordance with the ordinary regulations governing the Referendum. Any legislation passed by the Parliament-Oireachtas providing for such initiation by the people shall provide (1) that such proposals may be initiated on a petition of fifty thousand voters on the register; (2) that if the Parliament/Oireachtas rejects a proposal so initiated it shall be submitted to the people for decision in accordance with the ordinary regulations governing the Referendum; and (3) that if the Parliament/Oireachtas enacts a proposal so initiated such enactments shall be subject to the provisions respecting ordinary legislation or amendments of the Constitution as the case may be.

Article 48.

Save in the case of actual invasion, the Irish Free State/Saorstát Eireann shall not be committed to active participation in any war without the assent of the Parliament/Oireachtas,

Article 49.

Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Parliament/Oireachtas, but every such amendment must be submitted to a Referendum of the people, and shall not be passed unless a majority of the voters on the register record their votes and either a majority of the voters on the register or two-thirds of the votes recorded are in favour of the amendment.

SECTION III.—THE EXECUTIVE.

A.—EXECUTIVE COUNCIL/AIREACHT.

Article 50.

The Executive Authority of the Irish Free State/Saorstát Eireann is hereby declared to be vested in the King, and shall be exercisible in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada by the Representative of the Crown.

There shall be a Council to aid and advise in the Government of the Irish Free State/Saorstát Eireann to be styled the Executive Council. The Executive Council shall be responsible to the Chamber/Dáil Eireann, and shall consist of not more than twelve Ministers/Airi appointed by the Representative of the Crown, of whom four Ministers shall be members of the Chamber/Dáil Eireann and a number not exceeding eight chosen from all citizens eligible for election to the Chamber/Dáil Eireann who shall not be members of Parliament/Oireachtas during their term of office and who if at the time of their appointment they are members of Parliament/Oireachtas shall by virtue of such appointment vacate their seats, provided that the Chamber/Dáil Eireann may from time to time on the motion of the President/Uachtaran of the Executive Council determine that a particular Minister or Ministers not exceeding three may be members of Parliament/Oireachtas in addition to the four members of the Chamber/Dáil Eireann above mentioned.

Article 51.

The Ministers who are required to be members of the Chamber/Dáil Eireann shall include the President of the Executive Council and the Vice-President of the Executive Council/Tanaist. The President of the Executive Council shall be the Chief of the Executive Council, and shall be appointed on the nomination of the Chamber/Dáil Eireann, and the Vice-President of the Executive Council and the other Ministers who are members of the Parliament/

Oireachtas shall be appointed on the nomination of the President of the Executive Council; and he and the Ministers nominated by him shall retire from office should he fail to be supported by a majority in the Chamber/Dáil Eireann, but the President of the Executive Council and such Ministers shall continue to carry on their duties until their successors are appointed.

Article 52.

The Ministers who are not members of the Parliament/Oireachtas shall be nominated by a Committee of members of the Chamber/Dáil Eireann, chosen by a method to be determined by the Chamber/Dáil Eireann so as to be impartially representative of the Chamber/Dáil Eireann. Such Ministers shall be chosen with due regard to their suitability for office, and should as far as possible be generally representative of the Irish Free State/Saorstát Eireann as a whole rather than of groups or of parties. Should a nomination not be acceptable to the Chamber/Dáil Eireann, the Committee shall continue to propose names until one is found acceptable.

Article 53.

Each Minister not a member of the Parliament/Oireachtas shall be the responsible head of the Executive Department or Departments as head of which he has been so appointed as aforesaid, provided that, should arrangements for Functional or Vocational Councils be made by the Parliament/Oireachtas, these Ministers or any of them may, should the Parliament/Oireachtas so decide, be members of and be nominated on the advice of such Councils. The term of office of any such Minister shall be the term of the Chamber/Dáil Eireann existing at the time of his appointment, or such other period as may be fixed by law, but he shall continue in office until his successor shall have been appointed; and no such Minister shall be removed from office during his term unless the proposal to remove him has been previously submitted to a Committee chosen by a method to be determined by the Chamber/Dáil Eireann, so as to be impartially representative of the Chamber/Dáil Eireann, and then only if the Committee shall have reported that such Minister has been guilty of malfeasance in office, or has not been performing his duties in a competent and satisfactory manner, or has failed to carry out the lawfully expressed will of the Parliament/Oireachtas.

Article 54.

The Ministers who are members of the Parliament/Oireachtas shall alone be responsible for all matters relating

to external affairs, whether policy, negotiations, or executive acts. Subject to the foregoing provision, the Executive Council shall meet and act as a collective authority, provided, however, that each Minister shall be individually responsible to the Chamber/Dáil Eireann for the administration of the Department or Departments of which he is head.

Article 55.

Ministers who are not members of the Chamber/Dáil Eireann shall, by virtue of their office, possess all the rights and privileges of a member of the Chamber/Dáil Eireann, except the right to vote, and shall (if not members of the Parliament/Oireachtas) comply with the provisions of Article 17 as if they were members of the Chamber/Dáil Eireann, and may be required by the Chamber/Dáil Eireann to attend and answer questions.

Article 56.

Should the President of the Executive Council die, resign or be permanently incapacitated, the Vice-President of the Executive Council shall act in his place until a President of the Executive Council shall be elected. The Vice-President of the Executive Council shall also act in the place of the President of the Executive Council during his temporary absence.

Article 57.

The members of the Executive Council shall receive such remuneration as may from time to time be prescribed by law, but the remuneration of any Minister shall not be diminished during his term of office.

Article 58.

The Representative of the Crown, who shall be styled the Governor-General of the Irish Free State/Saorstát Eireann, shall be appointed in like manner as the Governor-General of Canada, and in accordance with the practice observed in the making of such appointments. The salary of the Governor-General of the Irish Free State/Saorstát Eireann shall be of the like amount as that now payable to the Governor-General of the Commonwealth of Australia, and shall be charged on the funds of the Irish Free State/Saorstát Eireann, and suitable provision shall be made out of those funds for the maintenance of his official residence and establishment.

Article 59.

The Executive Council shall prepare the Budget of receipts

and expenditure of the Irish Free State/Saorstát Eireann for each financial year, and shall present it to the Chamber/Dáil Eireann before the close of the previous financial year.

SECTION III.—THE EXECUTIVE

B.—FINANCIAL CONTROL.

Article 60.

All revenues of the Irish Free State/Saorstát Eireann, from whatsoever source arising, shall, subject to such exceptions as may be provided by law, form one fund, and shall be appropriated for the purposes of the Irish Free State/Saorstát Eireann in the manner and subject to the charges and liabilities imposed by law.

Article 61.

The Chamber/Dáil Eireann shall appoint a Comptroller and Auditor-General to act on behalf of the Irish Free State/Saorstát Eireann. He shall control all disbursements and shall audit all accounts of moneys administered by, or under, the authority of the Parliament/Oireachtas, and shall report to the Chamber/Dáil Eireann at stated periods to be determined by law.

Article 62.

The Comptroller and Auditor-General shall not be removed except for stated misbehaviour or incapacity on resolutions passed by the Chamber/Dáil Eireann and the Senate/Seanad Eireann. Subject to this provision, the terms and conditions of his tenure of office shall be fixed by law. He shall not be a member of the Parliament/Oireachtas, nor shall he hold any other office or position of emolument.

SECTION IV.—THE JUDICIARY.

Article 63.

The Judicial power of the Irish Free State/Saorstát Eireann shall be exercised and justice administered in public courts established by the Parliament/Oireachtas by judges appointed in manner hereinafter provided. These Courts shall comprise Courts of First Instance and a Court of Final Appeal, to be called the Supreme Court/Cuirt Uachtarach. The Courts of First Instance shall include a High Court/Ard Chuirt invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also Courts of local and limited jurisdiction, with a right of appeal as determined by law.

Article 64.

The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction.

Article 65.

The Supreme Court of the Irish Free State/Saorstát Eireann shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal, or Authority whatsoever.

Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.

Article 66.

The number of judges, the constitution and organisation of and the distribution of business and jurisdiction among the said Courts and judges, and all matters of procedure shall be as prescribed by the laws for the time being in force, and the regulations made thereunder.

Article 67.

The judges of the Supreme Court and of the High Court and of all other Courts established in pursuance of this Constitution shall be appointed by the Representative of the Crown on the advice of the Executive Council. The judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both the Chamber/Dáil Eireann and the Senate/Seanad Eireann. The age of retirement, the remuneration, and the pension of such judges on retirement and the declarations to be taken by them on appointment shall be prescribed by law. Such remuneration may not be diminished during their continuance in office. The terms of appointment of the judges of such other Courts as may be created shall be prescribed by law.

Article 68.

All judges shall be independent in the exercise of their functions and subject only to the Constitution and the law. A judge shall not be eligible to sit in the Parliament/Oireachtas and shall not hold any other office of emolument.

Article 69.

No one shall be tried save in due course of law and Extraordinary Courts shall not be established. The jurisdiction of Courts Martial shall not be extended to or exercised over the civil population save in time of war, and for acts committed in time of war, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction.

Article 70.

A member of the armed forces of the Irish Free State/Saorstát Eireann not on active service shall not be tried by any Court Martial for an offence cognisable by the Civil Courts.

Article 71.

No person shall, save in the case of summary jurisdiction prescribed by law for minor offences, be tried without a jury on any criminal charge.

SECTION V.—TRANSITORY PROVISIONS.

Article 72.

Subject to this Constitution and to the extent to which they are not inconsistent herewith, the laws in force in the Irish Free State/Saorstát Eireann at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Parliament/Oireachtas.

NOTE.—Articles 73 to 76 and Articles 79 contain transitory provisions which will be published in the course of a few days.[1]

[1] The Draft Constitution, as printed here, was issued for publication by the Provisional Government, on the evening of the 15th June, 1922.
The Articles referred to in the note were, when published later, in substance respectively the same as Articles 75, 76, 77 and 78, 80 and 83 of the Constitution.

Article 77.

After the date on which this Constitution comes into operation the Houses of the Parliament/Oireachtas elected in pursuance of the Irish Free State (Agreement) Act, 1922, being the Constituent Assembly for the settlement of this Constitution, may, for a period not exceeding one year from that date, but subject to compliance by the members thereof with the provisions of Article 17 of this Cnostitution, exercise all the powers and authorities conferred on the Chamber/Dáil Eireann by this Constitution, and the first election for the Chamber/Dáil Eireann, under Articles 26 and 27 hereof, shall take place as soon as possible after the expiration of such period.

Article 78.

The first Senate/Seanad Eireann shall be constituted immediately after the coming into operation of this Constitution in the manner following—that is to say:

(*a*) The first Senate/Seanad Eireann shall consist of two members elected by each of the Universities in the Irish Free State/Saorstát Eireann and 56 other members, of whom 28 shall be elected and 28 shall be nominated;

(*b*) The 28 nominated members of the Senate/Seanad Eireann shall be nominated by the President of the Executive Council, who shall in making such nominations have special regard to the providing of representation for groups or parties not then adequately represented in the Chamber/Dáil Eireann:

(*c*) The 28 elected members of the Senate/Seanad Eireann shall be elected by the Chamber/Dáil Eireann voting on principles of Proportional Representation;

(*d*) Of the University members one member elected by each University to be selected by lot shall hold office for six years, the remaining University members shall hold office for the full period of twelve years;

(*e*) Of the 28 nominated members 14 to be selected by lot shall hold office for the full period of twelve years, the remaining 14 shall hold office for the period of six years;

(*f*) Of the 28 elected members the first 14 elected shall hold office for the period of nine years, the remaining 14 shall hold office for the period of three years:

(*g*) At the termination of the period of office of any such members, members shall be elected in their place in manner provided by Article 31;

(*h*) Casual vacancies shall be filled in manner provided by Article 33;

(*i*) For the purpose of the election of members for any University under this Article all persons whose names appear on the Register for the University in force at the date of the coming into operation of this Constitution shall, notwithstanding anything in Article 14, be entitled to vote"

APPENDIX IV.

THE CONSTITUTION OF THE IRISH FREE STATE (SAORSTAT EIREANN) ACT, 1922.

SAORSTAT EIREANN

Number 1 of 1922

An Act to enact a Constitution for The Irish Free State (Saorstát Eireann) and for implementing the Treaty between Great Britain and Ireland signed at London on the 6th day of December, 1921.

Dáil Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of The Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows:

1. The Constitution set forth in the First Schedule hereto annexed shall be the Constitution of The Irish Free State (Saorstát Eireann).

2. The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as 'the Scheduled Treaty') which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Eireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.

3. This Act may be cited for all purposes as the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922.

APPENDIX V.

*ROYAL PROCLAMATION ANNOUNCING THE ADOPTION OF THE CONSTITUTION.**

BY THE KING.

A PROCLAMATION

GEORGE R. I.

WHEREAS the House of the Parliament constituted pursuant to the Irish Free State (Agreement) Act, 1922, sitting as a Constituent Assembly for the settlement of the Constitution of the Irish Free State have passed a Measure (hereinafter referred to as "the Constituent Act") whereby the Constitution appearing as the First Schedule to the Constituent Act is declared to be the Constitution of the Irish Free State.

And Whereas by the Constituent Act the said Constitution is made subject to the following provisions—namely :—

> "The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as the Scheduled Treaty) which are hereby given the force of law, and of any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty."

And Whereas by Article 83 of the said Constitution it is provided that the passing and adoption of the said Constitution by the Constituent Assembly and Parliament shall be

* Published in *Iris Oifigiuil* of the 6th December, 1922.

announced as soon as may be, and not later than the Sixth day of December, 1922, by Our Royal Proclamation:

And Whereas by the Irish Free State Constitution Act, 1922, it is enacted that the said Constitution shall subject to the provisions to which the same is by the Constituent Act so made subject as aforesaid, be the Constitution of the Irish Free State and shall come into operation on the same being proclaimed by Us in accordance with the said Article 83 of the said Constitution:

NOW, THEREFORE, WE, to the intent that the said Constitution shall come into operation forthwith, do hereby announce and proclaim that the Constitution of the Irish Free State as the same was passed and adopted by the said Constituent Assembly has been passed and adopted by Parliament.

Given at Our Court at Buckingham Palace, this Sixth day of December, in the year of Our Lord One thousand nine hundred and twenty two, and in the Thirteenth year of Our Reign.

GOD SAVE THE KING.

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